

Gunnar Selvik · Michael-James Clifton
Theresa Haas · Luísa Lourenço
Kerstin Schwiesow *Editors*

The Art of Judicial Reasoning

Festschrift in Honour of Carl Baudenbacher



Springer

The Art of Judicial Reasoning



Prof. Dr. iur. Dr. rer. pol. h.c. Carl Baudenbacher

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With Preface by H.S.H. The Hereditary Prince of
Liechtenstein

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Editors

Gunnar Selvik
EFTA Court
Luxembourg City, Luxembourg

Michael-James Clifton
EFTA Court
Luxembourg City, Luxembourg

Theresa Haas
EFTA Court
Luxembourg City, Luxembourg

Luísa Lourenço
EFTA Court
Luxembourg City, Luxembourg

Kerstin Schwiesow
EFTA Court
Luxembourg City, Luxembourg

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Foreword

This is the second Festschrift in honour of Carl Baudenbacher. The first, *Economic Law and Justice in Times of Globalisation*, edited by Mario Monti, H.S.H. Prince Nikolaus of Liechtenstein, Bo Vesterdorf, Jay Westbrook and Luzius Wildhaber in 2007, marked Carl's 60th birthday.

This second Festschrift marks a different milestone in Carl's life, his departure from the EFTA Court bench, and it does so in a different way. The contributors to this volume are drawn from the benches of national, regional and international courts, as well as from authorities who worked in close contact with the judiciary. All of the contributors have headed an institution, and, in this book, they have penned their own personal reflections on the *Art of Judicial Reasoning*. This compilation of remarkable essays provides the reader with meditations to consider when examining jurisprudence or indeed as a source for reflective practice.

In our daily work at the EFTA Court we have had the opportunity to see Carl's legal mind and his conviction as a judge in action, both in Luxembourg and on the world stage. The former Registrar noted in a recent speech that an op-ed by Professor Mads Andenæs and Dr Eirik Bjørge in *Dagens Næringsliv*, the Norwegian business newspaper, had represented the quintessence of Carl's contribution to the EFTA Court over more than two decades: the establishment of a well-functioning and respected court. On 3 October 2017, the authors wrote that 'Baudenbacher has made a considerable effort to secure the autonomy and recognition of the EFTA Court. Baudenbacher has been and is the saviour of the EEA Agreement. Without him and his credibility it is not a given that the EU would have let the system survive' (freely translated from Norwegian).

One of the EFTA Court's traditions is that a piece of art is acquired each year. These pieces are chosen by each judge consecutively and then displayed within the Court's premises. In the courtroom, amongst a number of other artworks, there is an installation on the wall to the side of the bench, where the judges and the Registrar sit. It reads: 'Is JUSTICE Justice?'. During the hearings, the question beams in bright neon blue letters from the wall. Needless to say, it was Carl who chose the installation.

Indeed, the artwork mirrors what we perceive as being Carl's approach to the law and to life: a focus on the contemporary, with an eye to the future, while drawing on the rich veins of the classical past. Yet this question, 'Is JUSTICE Justice?', entails a number of practical considerations for the 'art of judicial reasoning', which beg further reflection. For example, what are the parameters of the quality of an argument? How may a court or a judge gain, and maintain, independence? What may be said on judges' accountability? How do different courts achieve their tasks? What is the impact of language, and what implications stem from the procedural rules? And finally, is it the law alone which makes judicial reasoning an *art*?

We are particularly indebted to all the contributors for having shared their expert reflections and insights. We hope that this book will bring Carl great joy and will fit his enthusiasm for his profession. The Committee would thus like to thank Carl, on behalf of the EFTA Court's current and former staff, for his work at the EFTA Court and for the privilege it was to work with him. We wish him all the best in his future endeavours.

Luxembourg City, Luxembourg
September 2018

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Preface

In 2004, a year after Professor Baudenbacher was first elected President of the Court, he received the Small States Prize of the Herbert-Batliner-Europainstitut in Salzburg. In his acceptance speech, he reflected on the significance of international courts for small States. Professor Baudenbacher first highlighted the ‘judicialisation’ of international law and secondly the process of ‘judicial dialogue’. It is certainly true, as he explained, that small States particularly benefit from ‘judicialisation.’ Such rules move international conflicts from ‘closed door’ negotiations to ‘open court’. In diplomatic circles, a country’s bargaining power may vary according to its political stature on the world stage. The weight of an argument, however, depends only upon its quality. Similarly, the voice of a judge of a small State may be as strong as (and sometimes even stronger than) the voices of larger States.

Professor Baudenbacher has always had a strong voice, and the strength of the EFTA Court’s voice has excelled under his presidency. During the era of the ‘Baudenbacher Court’, the EFTA Court’s docket steadily increased. Alongside the Court’s hard-earned reputation for the clarity and persuasiveness of its judgments, the commendable speed with which those judgments were delivered shone ever brighter.

The second element Professor Baudenbacher referred to in his speech was the importance of ‘judicial dialogue’. To an extent, judicial dialogue is a necessary source of inspiration for smaller jurisdictions, as these courts may deal with specific legal questions less frequently than others. Liechtenstein is a champion of this kind of judicial dialogue, regularly citing decisions from Switzerland, Austria and Germany. In addition, ‘judicial dialogue’ constitutes an important gateway to the outside world for ideas fostered in a smaller jurisdiction and may add to its international standing.

The EFTA Court has also done particularly well in this regard. Being a court of only three, it relied naturally on the jurisprudence of the European courts in Luxembourg and Strasbourg. However, in turn, the General Court and the Court of Justice of the European Union, as well as its Advocates General, have cited the EFTA Court’s judgments frequently. The EFTA Court’s jurisprudence has been

cited, moreover, by the European Court of Human Rights and many national courts, including Germany, the United Kingdom and Switzerland.

Nevertheless, Professor Baudenbacher's work expanded far beyond the EFTA Court's bench. Indeed, what is unique about Professor Baudenbacher is his entrepreneurial flair in blending different roles. At present, he is the Director of the Competence Center for European and International Law at the University of St. Gallen HSG and Chairman of the renowned St. Gallen International Competition Law Forum ICF. From 1987 to 2013, he held the Chair of Private, Commercial and Economic Law at the University of St. Gallen HSG. He was a permanent visiting professor at the University of Texas at Austin, where he taught European law and international law, and he has taught at several German universities. Professor Baudenbacher has also published innumerable books and articles on European and international law, the law of obligations, labour law, law of unfair competition, anti-trust law, company law, intellectual property law, comparative law and the law of international courts and arbitration tribunals. Moreover, Professor Baudenbacher has used his powerful voice to advocate public ideas. This has been recognised, in part, by Basler Zeitung's listing of Professor Baudenbacher as one of Switzerland's fifteen most influential intellectuals for 3 years running.

By taking on all these different roles, Professor Baudenbacher has put into practice the notions of 'judicialisation' and 'judicial dialogue' throughout his career. By compiling essays that reflect on these issues, this *Festschrift* bears witness not only to *The Art of Judicial Reasoning*, but also to Professor Baudenbacher's spirit of reflection, as well as the esteem and affection with which he is universally held. In this, I am sure that all the contributors, and the future readers of this contemplative volume, will join me in thanking Professor Baudenbacher for his tremendous contribution to the EFTA Court and in wishing him, as he embarks on the next chapter of his career together with his beloved wife and daughter, all the very best for the future.

Vaduz, Liechtenstein
September 2018

Alois Hereditary Prince of Liechtenstein

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About the Authors

Knut Almestad Former Ambassador Almestad is in retirement after a long career in the Norwegian Foreign Service. He holds a law degree (*candidatus juris*) from the University of Oslo. As Director General for International Economic Affairs, he participated in the EEA negotiations as Deputy Head of the Norwegian Delegation and chaired the EFTA Negotiation Group IV (Flanking and Horizontal Areas). Appointed Ambassador on Special Mission, he chaired the EFTA Committee setting up the EFTA Surveillance Authority, subsequently to become its first president, a position he held for 8 years.

Jean-Luc Baechler is the President of the Federal Administrative Court ('FAC'). He completed law studies at the University of Fribourg and is licensed to practice law. In 1990, he was department head at the Federal Office for Refugees ('FOR') in Bern; in 1991, prefect of the district of la Broye: in that capacity he also worked as an administrative judge; and as of 2002, President of the District Court of Broye as well as the Labour Relations Board and Guardianship and lieutenant colonel at Army Staff, specialist in international and humanitarian law. Since 2007, he has been a federal judge at the Federal Administrative Court of which he has been the President since 2015.

Benedikt Bogason is a Justice of the Icelandic Supreme Court and a Professor of Law at the University of Iceland. He chairs the Board of the Judicial Administration in Iceland as well as being an ad hoc judge on behalf of Iceland at the EFTA Court. Previously, he served as a District Court Judge and before that as a Director of Legal Affairs at the Ministry of Justice. He has written several books and articles on law of obligations.

Henrik Bull has been a Justice of the Supreme Court of Norway from 2011, after having served as a judge of the EFTA Court from 2005. From 1985 to 1996, he was employed at the Legislation Department of the Ministry of Justice, inter alia taking part in the EEA negotiations. From 1996 to 2004, he worked at the Centre for European Law at the Law Faculty of the University of Oslo, with a doctor's degree

in financial services and free movement in 2002. From 2002, he served as director of the Centre and associate professor of the Law Faculty.

Francis Delaporte is the President of the Administrative Court and the Vice-President of the Constitutional Court in Luxembourg. He has been a member of the administrative judiciary since its establishment in 1997 and a member of the Constitutional Court since 2008. Since that time, he has also been the Luxembourgish Judge at the Appeals Committee of the Commission de la Moselle. In addition, he is a Judge at the Benelux Court of Justice. Francis Delaporte lectures at the University of Luxembourg, within the framework of the training courses for lawyers, as well as at the National Institute of Public Administration.

Luis José Díez Canseco Núñez Prof. Luis José Díez-Canseco Núñez, MCL, holds a law degree from the Pontificia Universidad Católica del Perú ('PUCP') and a master's degree from George Washington University Law School where he was a Visiting Scholar. Currently, he is the Dean of the Law School of the Universidad Tecnológica del Perú. He was a Fulbright and Hubert H. Humphrey Scholar and a Professor at the Postgraduate Schools of the PUCP, Universidad del Pacífico and Universidad Peruana de Ciencias Aplicadas and Professor at the Law School of PUCP. He served as President and Judge of the Tribunal of Justice of the Andean Community, has worked as an international officer at WIPO and UNCTAD and served as General Coordinator of the Competitiveness Programme of the Presidency of the Council of Ministers of Peru and the World Bank. He served as a member of the Competition Tribunal of INDECOPI (National Institute for the Defence of Competition and Intellectual Property) and a member of the deliberative body for dispute settlement at OSIPTEL (the Supervisory Agency of Private Investment in Telecommunications).

Peter Freeman CBE, QC (hon), is a Chairman of the UK Competition Appeal Tribunal. He was previously Chairman of the UK Competition Commission and before that a practising lawyer. He was for many years Chairman of the Regulatory Policy Institute, Oxford, and has written and spoken widely on competition and regulatory law. He is a member of the Advisory Board of the International Competition Forum, University of St Gallen, and the Scientific Board of Concorrência e Regulacao, Lisbon.

Vladimir Golitsyn Judge Golitsyn has been active in the field of International Law for almost five decades. At the Government level, he was Head of the Division of Public International Law in the Ministry for Foreign Affairs of the former USSR. At the United Nations, where he worked for 25 years in the Office of the Legal Counsel and as Director of the Division for Ocean Affairs and the Law of the Sea, he was involved in a wide range of legal matters, such as the establishment and implementation of the oil-for-food programme for Iraq, negotiation of arrangements related to the Lockerbie case, the demarcation of boundary between Iraq and Kuwait and the implementation of the Algiers Agreement between Eritrea and Ethiopia concerning

boundary issues. Judge Golitsyn was a Member of the International Tribunal for the Law of the Sea from 2008 to 2017 and served as President of the Tribunal from October 2014 to September 2017. Judge Golitsyn is currently Vice-President of the Russian Association of Maritime Law and Professor of international law at the Moscow State University.

Irmgard Griss studied law in Graz from 1966 to 1970. In 1975, she graduated with an LL.M. in International Legal Studies from Harvard Law School. In 1979, Griss started to work as a judge. From 2007 to 2011, she was the President of the Austrian Supreme Court. After retiring as a judge, Griss chaired the “Independent Commission of Inquiry for the Transparent Investigation of the Events of the Hypo Group Alpe-Adria” and is currently a Member of the Austrian Parliament.

Marc Jaeger has been the President of the General Court, formerly the Court of First Instance, since September 2007. Previously, he was a judge at the Luxembourg District Court since 1984, a judge at the Court of First Instance since July 1996 and then President of a Chamber between 2004 and 2007. He lectured at the universities of Luxembourg, Nancy II and Rome (Luiss). He is a member of many scientific committees and reviews, and is the author of numerous contributions published in edited books, law journals and other series.

Koen Lenaerts born 1954, lic. iuris, has a PhD in Law (Katholieke Universiteit Leuven) and is Master of Laws and Master in Public Administration (Harvard University); Lecturer (1979–1983) and subsequently Professor of European Law, Katholieke Universiteit Leuven (since 1983); Legal Secretary at the Court of Justice (1984–1985); Professor at the College of Europe, Bruges (1984–1989); member of the Brussels Bar (1986–1989); Visiting Professor at the Harvard Law School (1989); Judge at the Court of First Instance of the European Communities from 25 September 1989 to 6 October 2003; Judge at the Court of Justice since 7 October 2003; Vice-President of the Court of Justice from 9 October 2012 to 7 October 2015; and President of the Court of Justice since 8 October 2015.

Paul Mahoney Sir Paul Mahoney, KCMG is a member of the Council of Europe’s Advisory Panel of Experts on Candidates for Election to the European Court of Human Rights, and was the UK judge (2012–2016) and registrar (2001–2005) at the European Court of Human Rights. Sir Paul Mahoney was also the President of the European Union Civil Service Tribunal (2005–2011) and an associate editor of the Human Rights Law Journal (1980–2012). He holds an honorary doctorate awarded by Aristotle University, Thessaloniki.

Andreas Mundt has been President of the German Bundeskartellamt (Federal Cartel Office) since December 2009. In September 2013, he was elected as the Steering Group Chair of the International Competition Network and was re-elected for a second term in May 2015. After qualifying as a lawyer following studies at the University of Bonn and the University of Lausanne, Switzerland, Andreas Mundt

entered the Federal Ministry of Economics where he worked from 1991 to 1993. He then joined the staff of the Free Democratic Party in the German Parliament from 1993 to 2000, where he was in charge of the portfolio of labour and social law. In 2000, Andreas Mundt joined the Bundeskartellamt as rapporteur, with responsibility for banking and card payment systems issues. He was Head of the International Section of the Bundeskartellamt from 2001 to 2005 and Director of General Policy from 2005 to 2009.

Sven Norberg Dr. Sven Norberg is a former Swedish Judge of Appeal, who was Director in DG Competition of the European Commission (1995–2005). Before that he was Judge of the EFTA Court (1994 and 1995). This followed 12 years as Director Legal Affairs in the EFTA Secretariat, during which period he was *inter alia* in charge of all legal and institutional issues under the negotiations on the Agreement on the European Economic Area (“EEA”). Before joining the EFTA, he was Permanent Secretary and Chief Legal Officer in the Swedish Ministry of Trade and Commerce. He is the author of numerous articles and books on the EU and the EEA and a Member of the Board of the *Europarättslig Tidskrift*, the main Scandinavian European Law Journal. Since 2006, he is Senior Advisor at KREAB, Brussels.

Toril Marie Øie was appointed Chief Justice of the Supreme Court of Norway in March 2016. She previously held the appointment of Supreme Court Justice from 2004. From 1986 to 2004, she was employed at the Legislation Department of the Ministry of Justice, and in the years between 1994 and 2002, Øie also held a position as Senior Lecturer at the Institute of Public Law at the University of Oslo. Øie has written or contributed as co-author to several textbooks and has written various articles, mainly on criminal law and procedure.

Borgeir Örlygsson is President of the Supreme Court of Iceland. Before being appointed to the Supreme Court, he served as a Judge at the EFTA Court for 9 years; was Permanent Secretary in the Ministry of Industry and Trade in Iceland for 4 years; was Professor of Law at the University of Iceland, Faculty of Law, for 15 years; and before that was a Judge at the City Court of Reykjavík. He has published several articles and books on property law, law on mortgages and law of obligations. He got a law degree from the University of Iceland, Faculty of Law, in 1978 and an LL.M. degree in public and private international law from Harvard Law School in 1980.

Anne-José Paulsen was appointed Vice-President of the Mönchengladbach Regional Court (*Landgericht Mönchengladbach*) in 1996, and in 1998, she was appointed President of the Regional Court Bochum (*Landgericht Bochum*). In March 2002, Anne-José Paulsen was appointed as the first female President of a Higher Regional Court in North Rhine-Westphalia. She was also appointed Vice-President of the Constitutional Court for the Land of North Rhine-Westphalia. Her tenure as President of the Higher Regional Court ended at the end of February 2018.

Currently, she is the chair of the University Council at Heinrich-Heine-University, Düsseldorf.

Georges Ravarani doctor of law, was successively civil judge at the Luxembourg District Court, *avocat*, President of the Administrative Court and President of the Supreme Administrative Court of Luxembourg. From 2008 to 2015, he was also Vice-President of the Constitutional Court. From 2008 to 2016, he was a professor at the Luxembourg University. Since 2015, he is a Judge at the European Court of Human Rights. He has published in the field of private law – especially tort law – and public law.

Hubertus Schumacher Univ. Prof. Dr. Hubertus Schumacher has practised as a lawyer in Innsbruck since 1982. His law firm is specialised in economic matters and, in particular, on banking, foundation, insolvency law and arbitration. Prof. Schumacher continuously provides expert opinions in those fields. In 2008, he was appointed Professor of Civil Procedure Law at the University of Innsbruck. Prof. Schumacher has been a judge at the Princely Supreme Court in Liechtenstein since 2006, where he has sat as the Court's President since 2015.

Vassilios Skouris Prof. Dr.Dr.h.c.mult. Vassilios Skouris is an Emeritus Professor at the Law School of the Aristotle University of Thessaloniki. He studied law at the Free University of Berlin and received his doctorate at the University of Hamburg with a focus on constitutional and administrative law. Since 1972, he has served as a professor at various German and Greek universities. Skouris became a Judge at the European Court of Justice in 1999 and, from 2003 to 2015, served as its President. He is President of the Governing Board of the Centre of International and European Economic Law in Thessaloniki. Since May 2017, Skouris is the chairman of FIFA's Ethics Committee.

Gian-Flurin Steinegger is a Court Clerk at the Federal Administrative Court ("FAC"). He completed law studies at the University of Bern followed by a legal internship. As of 2011, he was a research assistant to Professor Matthias Mählmann at the University of Zurich and Captain at Army Staff as specialist in international and humanitarian law. Since 2016, he is a Court Clerk at the Federal Administrative Court in Division IV (Asylum).

Sven Erik Svedman was the President of the EFTA Surveillance Authority in Brussels from 2015 to 2017. Trained as an economist (siv.øk), he has had a long and distinguished career in public service. Mr Svedman has served as State Secretary, Secretary General and Director-General for Europe in the Norwegian Ministry of Foreign Affairs and Ambassador to Israel (1994–1997), to France (2003–2005) and to Germany (2007–2014). Until 2015, he was Chief Economist at the Norwegian Ministry of Foreign Affairs.

Antonio Tizzano is Vice-President of the Court of Justice of the European Union, Professor Emeritus of EU Law at the University of Rome and Director of the journal “*Il Diritto dell’Unione Europea*” and was awarded doctor honoris causa of the University of Paris II Panthéon-Assas, *Cavaliere di Gran Croce al Merito* [Knight Grand Cross of the Order of Merit of the Italian Republic] and *Legion d’honneur* [Legion of Honour of the French Republic].

Marc van der Woude is the Vice-President of the General Court of the European Union. He started his career as a tutor at the College of Europe in Bruges and as a lecturer at Leiden University. He then joined the European institutions where he worked for DG Competition, the European Court of Justice as a legal secretary and the Commission’s legal service. He resigned from the European civil service to become a member of the Brussels bar, where he practised European and competition law for 15 years. Marc van der Woude became a professor in competition law at the Erasmus University of Rotterdam and acted for 4 years as an advisor on energy policy for the Dutch government. Marc van der Woude is an author of numerous publications on European and competition law and still teaches at Rotterdam University.

Bo Vesterdorf born 1945, dr.iur.h.c., cand.jur. 1974, was a judge at the Court of First Instance (now named the General Court of the European Union) since 25 September 1989. He was the President of the Court of First Instance from 4 March 1998 to 17 September 2007 and is author of a large number of legal articles on EU law and in particular on EU competition law. He retired as of September 2007 and is now a consultant to various law firms.

Jean-Claude Wiwinius after graduating from the University of Paris Panthéon-Sorbonne, started in 1980 his career as a judge in Luxembourg. Following a 3 years’ professional experience as a legal secretary of the Court of First Instance of the European Communities, he was called upon to take over the function of advocate general at the Superior Court of Justice, and in 1999, he became a Judge of the Court of Appeal. In 2015, he became Vice-President at the Superior Court of Justice as well as counsellor at the Court of Cassation. Since 2012, he has been a judge at the Constitutional Court. On 2 August 2016, he has been appointed as president of the Superior Court of Justice and of the Constitutional Court, thus representing the judiciary in Luxembourg. His areas of interest are family law, criminal law and the Luxembourg private international law on which he has written a reference work.

Part I

Art and Method

E gudde Noper – A Good Neighbour



Francis Delaporte

In choosing this title, I do **not** intend to refer to a certain Luxembourg bank – named after a well-known German pioneer of the cooperative movement – that used these three simple words as its slogan. The phrase itself is deeply rooted in our culture. As the saying goes, no one can dwell in peace if his evil neighbour will not allow this. Conversely, this results in an important principle for harmonious co-existence, that of being a good neighbour – *de gudde Noper*.

Since January 1997 the Luxembourg administrative courts have been located in the building officially known as the *Hémicycle européen*. On their arrival, this building was already home to another court – and an international one at that – the EFTA Court. We have been neighbours for over 20 years. The EFTA Court occupies level –2 of the building, tastefully furnished at the Court’s own expense.

The Luxembourg administrative courts, that is the Administrative Court (the *Tribunal administratif*, the first instance administrative court) and the Administrative Court of Appeal (the *Cour administrative*, Luxembourg’s highest administrative court), were both originally located on the building’s level –3. At the time, in 1997, levels –4 to –6 were occupied by the Translation Service of the European Communities. Only when that European body relocated to a larger building in the Cloche d’Or district on the edge of the city could each of the Luxembourg courts be allocated a separate floor. Since the second half of 2016, the Administrative Court of Appeal, together with the courts’ own administrative services, continue to occupy level –3, and the first instance Administrative Court is now located on level –4. In addition, a new courtroom has been established on level –5, equipped to meet the latest standards, including those concerning IT and translation/interpreting services.

President of the Administrative Court of Luxembourg and Vice-President of the Constitutional Court of Luxembourg.

Translated from Luxembourgish and German by Paul Skidmore.

F. Delaporte (✉)

Administrative Court, Luxembourg, Luxembourg

Constitutional Court, Luxembourg, Luxembourg

Something unique is taking shape here. This will be the first time that a national court has the opportunity to share a courtroom with both a European and an international court. However, reader take note, this is not a reference to the EFTA Court! Rather, it is envisaged that the European appellate court in patent matters, that is, the Court of Appeal of the new Unified Patent Court, will take up residence on level –5 and, as a result, will share the courtroom located on that floor with our Administrative Court. At present, it is unclear when exactly this will happen as several hurdles remain to be cleared before the Unified Patent Court can commence operations and its Court of Appeal opens for business in Luxembourg. For many months, issues associated with Brexit were said to be delaying the Court of Appeal's arrival. Now it is a case pending before the German Federal Constitutional Court which is holding up matters. However, as the saying goes, ultimately, good things come to those who wait.

As for the international court, this already has its legal residence in Luxembourg, with hearings envisaged in this same courtroom on level –5. The court in question is the Benelux Court of Justice, which under the revised Benelux Treaty has transferred its seat from Brussels to Luxembourg. At the time of writing, however, it has not yet held any sittings in Luxembourg. This results from transitional arrangements of a practical nature. Hence, since 2016, the only court to make regular use of the new courtroom is our Administrative Court – which is extremely satisfied with the facilities.

Carl, as a good neighbour, attended the inauguration of the new courtroom by Minister for Justice Félix Braz on 21 October 2016 and his presence was greatly welcomed by all.

How exactly did it happen that our administrative courts came to be located in the *Nouvel Hémicycle* building and thus we became neighbours?

The fact is that the *Nouvel Hémicycle* building was constructed to accommodate plenary sessions of the European Parliament and naturally was intended to host European institutions, first and foremost, the European Parliament itself. In that sense, as national courts, we are to a certain extent aliens in this building.

But first things first. For many years, in addition to holding sessions in Strasbourg, initially in the Council of Europe building in the Allée de la Robertsau, the European Parliament, whose secretariat is still partly located in Luxembourg, also held plenary meetings here in this city. For those purposes, a debating chamber (hemicycle) was constructed in the building named after the founding father Robert Schuman, who, as is well known, was born in Luxembourg and whose birthplace is only a stone's throw from the common seat of our courts. In the early years, that conference room, which as a debating chamber can accommodate around 200 people, sufficed for a European parliament. Namely, prior to 1979, its members were not directly elected, but delegates of the parliaments of the Member States – a model still in use today for the parliamentary assemblies of the Council of Europe, NATO, or indeed the Benelux union. However, a decision was taken to introduce direct elections to the European Parliament, with the first election scheduled for June 1979. In anticipation of that development, in the early 1970s Luxembourg sought to strengthen its hand by constructing a modern skyscraper in contemporary style on the Place de l'Europe, on the site where today the Philharmonie by Christian de Portzamparc stands. The French architect Roger Taillibert was approached. He had

designed the olympic swimming pool on nearby Boulevard Kennedy, also known as the *Coque* – seashell – on account of its shell-shaped roof. That building replicated his earlier swimming pool design, constructed for the 1976 Olympic Games in Montréal. The same architect was commissioned to design a modern skyscraper on the Place de l'Europe for housing the European institutions to stand alongside the existing Alcide de Gasperi Building. A model of Taillibert's design for this building is currently on display in the Lëtzebuerg City Museum as part of the permanent exhibition covering the city's 1000-year history.

It is clear from the model that this proposed skyscraper resembles the form of a bird. Resting on a low base containing the entrance lobby, a gently domed corpus can be seen, easily interpreted as the body of a bird, to which two towering wings are attached. The local nickname given to this project was not *Big Bird* or *de Vull* (Luxembourgish for 'the bird') but reflected a specific species of bird, the raven (in Luxembourgish "*de Kueb*"). Evidently, in the eyes of the local community, this project was too gargantuan. It dwarfed the Alcide de Gasperi Building, which at the time clearly marked the acceptable height for an office building. In short, the project was never realised.

This left Luxembourg with a dilemma. The debating chamber in the Robert Schuman building could only accommodate some 200 parliamentarians, however the new directly elected European Parliament would encompass almost 600 members. Nowhere in the country was there a debating chamber of that size. A solution was quickly needed. It was achieved almost overnight. The architect Pierre Bohler was commissioned to design a debating chamber for the directly elected European Parliament in the immediate vicinity of the Alcide de Gasperi Building. Most likely inspired by the design for the original *Kueb* complex in which various structures fanning out below the entrance lobby were incorporated in the hillside, Bohler proposed a unique building fitted out both externally and internally in a highly contemporary style. The building has the appearance of being 'glued' to the rock face and is anchored in place by a series of steel cables.

At the end of the 1970s, within a matter of not many months, the *Nouvel Hémicycle* building, as it is officially known today, was constructed by a team of Luxembourg firms, primarily from the Arbed Group, notably the general contractor Paul Wurth SA. It did not take long for a local nickname to emerge. The new project was more compact and its proportions much more restrained than the original building proposed by Taillibert. Hence the *Nouvel Hémicycle* building, in which each of our courts came to reside much later, became quickly known as *de klenge Kueb* – the little raven. And although on two separate occasions the directly elected European Parliament of 1979 held plenary sessions in the newly constructed debating chamber in Luxembourg, it evidently preferred to meet in the Council of Europe's debating chamber in the Palais de l'Europe in Strasbourg.

The new *klenge Kueb* building faced the risk of abandonment. Thus, in 1995, as space was still available in the *klenge Kueb* building, it became home to the EFTA Court. Carl, a member of the EFTA Court for 22 years, probably knows this story best.

In the same year, 1995, the European Court of Human Rights in Strasbourg delivered a very important judgment for Luxembourg in the *Procola* case. It arose from a challenge to Luxembourg's implementation of the European milk quota system, which was controversial amongst dairy producers at the time. But the judgment itself was directed at a wholly different aspect, calling into question the Judicial Committee of the Conseil d'Etat, at the time the only judicial body competent to hear disputes in administrative proceedings. The European Court of Human Rights applied a principle well-known in English law:

Justice must not only be done, but must be seen to be done.

It held that where, as in the case of the Conseil d'Etat, the same persons or at least a majority of those persons applied the provisions of a statute, on which in an advisory capacity they had given an official opinion, an individual appearing as a party before the court could not, at least from the individual's own perspective, regard that court as sufficiently impartial for the purposes of Article 6 of the European Charter of Human Rights, which sets out that everyone is entitled to a hearing by an independent and *impartial* tribunal. For Luxembourg, that judgment heralded the end of the Conseil d'Etat as a judicial body.

Consequently, a system of administrative courts had to be established. This took place within a relatively short period. The Constitution was amended on 12 July 1996 with the introduction of Article 95*bis* which provided for the creation of the two administrative courts. A statute of 7 November 1996 set out in detail the organisation of those courts. It was intended that the new courts should commence operations on 1 January 1997. However, in autumn 1996, a pressing question remained: where should these new courts take their seat?

We must remember that these events were not taking place in Germany or Switzerland. Had a German or Swiss perspective been adopted, the city of Luxembourg would have had completely no chance of becoming the seat of the administrative courts.

Instead, following a German or Swiss approach, every other moderately representative town or city in the country would have been considered a potential seat, but not the city of Luxembourg, which is the seat of the government and almost all executive bodies. However, in Luxembourg, where for decades a search had been underway to find a new residence for the ordinary courts, the principal argument was that the main functions of the state should be located and remain in the centre of Luxembourg City. Consequently, after long deliberations, the new *Cité Judiciaire* (judicial quarter) was built not on the periphery or outside the city but at its very heart: on the Plateau du Saint Esprit.

A logical solution back in 1996 would have been to locate the administrative courts close to the ordinary courts. However, the decision was evidently taken at that time to maintain existing practice in the sense that two court systems were to continue operating in parallel, not incorporating the jurisdiction in administrative matters within the system of the ordinary courts.

The issue attracted little contemporary attention; the decision to retain the two court systems being reached without great controversy. My predecessor Georges

Ravarani was one of the few to argue publicly in 1996 that it would satisfy the internal logic of the court system to allocate to the ordinary courts the administrative and tax disputes previously heard by the Judicial Committee of the Conseil d'Etat. For those purposes it would suffice to create a few additional chambers at the District Court for the first instance and at the Court of Appeal for the second instance. At the time, this was a rather solitary view.

The fact is that in 1996 the ordinary court system already occupied all the space it had, with facilities spread across numerous buildings. Thus not even in spatial terms was it possible bring the two court systems together.

It would appear that in the process of establishing the new administrative courts the Minister for Justice at the time, Marc Fischbach, recalled that shortly beforehand he had arranged for a new court, that is to say, the EFTA Court, to take its seat on the Kirchberg. It transpired that in the said *klenge Kueb* building a further floor, level –3, was empty. And so the decision was taken to install the new national courts on that floor even though the building was *a priori* European.

I can clearly recall how in November 1996, as newly appointed judges, expected to take up our activities on 1 January 1997, we took our first glimpse of our new facilities, still undergoing conversion work at the time. I also remember us thinking that it could not be such a bad thing to operate as a court in this building seeing as the EFTA Court had taken up residence here and appeared very satisfied with the decision. However, not everyone in the legal profession shared the conviction that it was a good idea to site national courts on the Kirchberg Plateau, outside of the city centre. This measure was indeed a first. Traditionally, the other courts held their sittings in the centre. Lawyers criticised the absence of physical proximity to the other courts, making it difficult to appear in both locations for hearings scheduled at a similar time. With time, we as judges have learned to appreciate our certain distance from the city centre, not encountering on a daily basis the ministers and public servants whose decisions are contested in the cases brought before us.

Our close proximity to the EFTA Court almost came to an end several years ago because we were extremely short of space and it appeared wholly impractical to continue housing both administrative courts on level –3 of the building. This was due in part to the significant increase in the number of cases brought before the first instance Administrative Court. Whereas the Judicial Committee of the Conseil d'Etat was accustomed to dealing with 250 matters each year, the workload of the Administrative Court expanded rapidly, soon receiving more than 1000 cases annually. The court's size increased noticeably. Growing from a team of seven judges at the start, the court now has 13 judges assisted by two fixed-term legal trainees and from January 2018 two probationary judges (*attaché de justice*). At the same time, the number of legal secretaries and the necessary administrative staff also increased. The Administrative Court of Appeal continues to be composed of five members.

Around 10 years ago, we reached the position that if the Translation Service of the European Communities did not move out of the *Nouvel Hémicycle* building, the administrative courts would no longer be able to remain. Minister for Justice François Biltgen had a solution to hand that appeared interesting at first glance. The Alcide de Gasperi Building was under refurbishment. Following the refit, it was

intended that the building should be used primarily by Luxembourg institutions and bodies. Consequently, the idea was floated that the administrative courts should remain on the Kirchberg plateau and simply relocate to the newly modernised Alcide de Gasperi Building.

When Court President Ravarani explained to the Minister for Justice that we were born of the *Procola* judgment, and thus appearance was of paramount importance and, consequently, in terms of our impartiality, taking up residence in the Alcide de Gasperi Building, home to several national ministries, could not be countenanced on image grounds alone, the Minister was noticeably disappointed at first. He had anticipated that the administrative courts would warmly welcome his proposal. However, the better arguments prevailed, with all accepting that it would be inappropriate to locate the administrative courts in the same building as their potential clients. For this reason too, the EFTA Court is an excellent neighbour to have.

Not only in Luxembourg, but particularly so here, it is common for people to live or work alongside others for many years without developing any close contact. Indeed, until very recently, I cannot recall having had any particularly close contact with our neighbours at the EFTA Court. Naturally, our paths crossed from time to time and of course we all knew Carl as the long-standing President of the EFTA Court. In particular, his wife Doris, became quite a figure in Luxembourg, not least because of the exquisite and delightful outfits that she wears to official occasions, chosen with her self-assured flair, and often tailored by Doris herself. Particularly celebrated is the colourful headwear that graces her appearances at the annual *Te Deum* service on Luxembourg's National Day.

A particular sign that Doris and Carl would feel at home in Luxembourg follows from the fact that, at least from a Luxembourg perspective, they could not have chosen (albeit, unwittingly, at the time) a better name for their daughter: Melusina. It is clear that the folktale figure of the mermaid Melusina is not limited simply to Luxembourg. I have heard that the figure of Melusina is well known not only in Prague but also in Albania. Moreover, the story of this mermaid, like many others, may well originate in the Caucasus region, where Noah's ark is said to have come to rest after the Flood. An auspicious choice indeed!

It was not until November 2015 when I became President of the Administrative Court of Appeal, that regular opportunities arose to engage with Carl directly. We were quickly on first name terms and found numerous possibilities to interact in the way good neighbours do. I discovered the EFTA Court's lunchtime talks to be an enjoyable and instructive experience. With time other colleagues became inspired to participate too. In spring 2017, I myself was the invited speaker at one of these talks. This followed a similar invitation from Carl the previous year to speak at a symposium at the University of St. Gallen. The EFTA Court's Spring Conferences opened up new horizons for me and our courts started to attend the other's official events, as things should be between close neighbours. Consequently, Carl's decision to leave the EFTA Court after 22 years of service reminds me of the old saying that it's best to leave on a high note.

Discussing legal problems with Carl is very rewarding, not only on account of his European vision, but also as a result of his perspective on law, formed initially by

the Swiss and German approaches. For us, as servants of the law in Luxembourg, these approaches are extremely interesting. We did not go through those schools. Instead, we have been shaped by the French legal tradition, which, characteristically, presupposes a linear, almost geometric, view of the legal system, lawfulness and the notion of strict legality. However, in the administrative courts, we have always perceived an alternative current, having to apply tax legislation, adopted during the occupation and retained in the post-war period, which follows a very different logic to administrative law texts shaped in the French tradition. This is well illustrated by the accounting principle of *substance over form*, which often stands in diametrical opposition to the perpendicular French view on legality.

Through my discussions with Carl I quickly came to realise his profound understanding of these different perspectives on how to approach law and recognised his personal experience in dealing with these in the work of the EFTA Court. As far as I can tell, the Norwegian view of public authority or State sovereignty has little in common with the way it is regarded in Liechtenstein and is once again different from the Icelandic legal system, characterised, as a rule, by a fairly pragmatic vision of the legal order.

What particularly interests me is the internal inconsistency that Carl has had to deal with throughout his whole professional career in Luxembourg in order to ensure that the judgments of the EFTA Court are equally as effective as those delivered by the Court of Justice of the European Union on the other side of Boulevard Kennedy. Also a good neighbour that we have in common.

Following Brexit, set in motion by the referendum held on 23 June 2016, incidentally Luxembourg's National Day, I understand that the way the EFTA Court functions, in particular, the manner in which its judgments take effect, could appear particularly attractive in the United Kingdom, as the supranational character of the European Union and the impact of the rulings given by the Court of Justice of the European Union and the European Court of Human Rights was seemingly a thorn in the flesh for many British people. Is this the irony of fate? Or simply the intrinsic fact that in every being there is an also alter ego of non-being?

One of the most powerful phrases with which Carl impressed me is his observation: "Judges must fill out their judicial office. And where there is a gap, that too must be filled by the judges." I have cited this phrase more than once, including in public lectures; naturally, with full acknowledgement of its original author. This proposition has given me considerable food for thought in how I should discharge my duties as a judge. Increasingly, I ask myself whether here in Luxembourg we are in fact excessively characterised by a traditionally French legal perspective with a near dogma, according to which only a straight line is capable of separating two legal fronts. I wonder increasingly whether we should undergo a paradigm shift, similar to that effected in the early twentieth century when it was realised that Newton's laws of space did not properly account for the path of Mercury's orbit around the sun. This conundrum was resolved, in particular through the work of Albert Einstein, by showing that the orbit of a planet within a certain distance from the sun, Mercury, for example, could not be linear but by reason of the magnetic fields was in fact wavelike, in other words, sinusoidal. Do we not already recognise,

for example, that the principle of separation of powers cannot be viewed as a linear separation between the three branches of the State but, as we would say in French, must be regarded as something more *souple*? Is it possible that a certain relativity has entered our way of thinking? Precisely this relativity is likely to inspire further legal thoughts ... With this in mind, I say: *ad multos annos*, Carl!



“The Court of Justice Shall Ensure Observance of Law and Justice in the Interpretation and Application of This Treaty” (The Treaty of Rome, Article 164)

Knut Almestad

1 Fundamental Rules and Human Rights in the EU

1.1 The European Court of Justice Takes Charge

The mission formulated in Article 164 EEC for the task to be performed by the ECJ has the terseness of a military assignment. Indeed, it does give the sense of a calling to act as a guardian of the constitution of a new, broad-based and durable form of integration, based on a common market and close economic co-operation between Western European States, which just a few years before had fought each other in a devastating continental war. Part of the backdrop to this was the earlier failures in the 1950s to finalise the attempted Treaties on Defence and the European Political Union.

The fathers of this new type of integration did not want to venture further into new terrain than was necessary. The foundation for this integration model was the supranational institutions that were new to trade agreements at the time. This was copied from the European Coal and Steel Community, which was now to become one of the treaties in the triad forming the new organisational structure. The Member States displayed no intention of relinquishing national control in matters of security policy. Essentially, the same reluctance was shown towards the inclusion of the broad field of social policy. Particularly striking was the fact that the European Convention on Human Rights (“ECHR”), which had been signed only a few years earlier, was not mentioned at all in the Treaty of Rome.

In the 1960s, the political energy of the EEC was spent mostly on finalising the Adaptation Period during which the Customs Union was put into effect and establishing the complicated and conflict-laden Common Agricultural Policy. Then, in

Former Ambassador, and former President of the EFTA Surveillance Authority.

K. Almestad (✉)
Oslo, Norway

the 1970s, the Member States ran into even more crippling disagreement over majority voting in the European Council (“the Council”).

However, while the Council was bogged down at in conflicts regarding the use of majority voting and the administration of the Common Agricultural Policy, which paralysed almost every new integration initiative, it was the European Court of Justice (“ECJ”) which kept the ship sailing through a series of landmark rulings.

In *Van Gend en Loos*¹ the ECJ, contrary to the pleas of The Netherlands, pronounced that the EEC Treaty was not merely an agreement between Governments, but also gave individual rights to market operators which produced direct effects in the Member States. This principle was subsequently established by a series of milestone rulings, which gave effect to the fundamental freedom of free movement of goods where harmonisation efforts had failed.

Regarding the relationship between the fundamental freedoms and human rights, the ECJ, except for occasional use of the scattered provisions to be found in the Treaties, maintained a respectful distance from the ECHR until *Stauder*.² In the following years, the ECJ regularly applied human rights law in its rulings, not only in cases falling within the scope of the Treaties in general, but also in cases where respect for certain fundamental rights were found to be essential for the functioning of the Internal Market. As such, they were seen as general principles of Community law, which were to be applied also when reviewing measures adopted either by Community institutions or Member States when implementing Community law.

Based on this practice, “the Law” according to Article 164 was seen to emanate from:

- the constitutional traditions of the Member States; and
- the international treaties to which the Member States belonged, particularly the ECHR.

1.2 *The Political Institutions Become Active*

In 1977, the European Parliament, the Commission and the Council signed a Joint Declaration in which they undertook to continue to respect fundamental rights from the constitutional traditions of the Members States and the international treaties to which they belonged, and in particular, the ECHR, as noted above. However, it took quite some time before these bodies actually exercised their legislative powers to clarify a legal situation which was increasingly perceived as being riddled with borderline issues.

During the process to restructure the Community and complete the Internal Market which began in the early 1980s, a novel step was taken to include in the preamble of the Single European Act the following recital:

¹ Case C-26/62 *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR I.

² Case C-26/69 *Stauder v. City of Ulm – Sozialamt* [1969] ECR 419.

Determined to work together to promote democracy on the basis of the fundamental rights recognized in the Constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter,³ notably freedom, equality and social justice...

This represented the legal basis of the Community for human rights and fundamental freedoms at the time when the EEA negotiations began. During the negotiations on the Maastricht Treaty, most Member States wanted to incorporate the Social Charter into Community law. However, on account of stiff British opposition, the negotiations did not result in any material change, but merely a renumbering of Articles 164 to 220 EEC with a simple rephrasing of their wording. The other eleven Member States then concluded an agreement on social policy amongst themselves, which was added to the Treaty as a Protocol on Social Policy.

This meant that the text of the Single European Act remained unchanged. However, among legal scholars and politicians a broad process had started, which called for a clear legal text able to encapsulate the increasing importance of human rights, reflecting the political changes taking place both on the European continent and in daily life. The idea that the Community should accede to the ECHR was floated, and the Council decided to ask the ECJ whether it would be compatible with the Treaties to do so.

In March 1996, the ECJ answered in the negative, pointing out that under Community law as it then stood, the Community lacked such a competence. Moreover, the ECHR foresaw only the membership of States.⁴ However, the ECJ confirmed that it had jurisdiction also in human rights' matters.

During the negotiations on the Treaty of Amsterdam, the United Kingdom softened its initial opposition, and for the first time the legislators could formulate the first legal basis for fundamental rights in the Treaty on the European Union ("TEU"), which in its Article 6 stated that:

1. The Union is founded on principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.
2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

Furthermore, in the preamble of the Treaty, the signatories confirmed their commitment to social rights, as defined in the European Social Charter signed in Turin on 18 October 1961 and in the Community Charter of the Fundamental Social Rights of Workers.

³The European Social Charter is a Council of Europe treaty aiming at supporting the ECHR, which was opened for signature in 1961 and became effective in 1965. Revised in 1996, the initial treaty will gradually be replaced. This treaty must not be confused with the Charter of Fundamental Rights of the European Union, which meets the demand for a kind of "Bill of Rights" for all those living in the European Union, and which came into force in 2009, see below.

⁴Opinion 2/94 [1996] ECR I-1759.

The public debate that followed Opinion 2/94 is largely described as consisting of three groups:

- those who advocated the *status quo*, seemingly a minority;
- a larger group who wanted to amend the Treaty to allow EU accession to the ECHR; and
- a similarly important group who also advocated for an amendment to the Treaty to include a “bill of rights” specific for the EU.

As the Treaty of Amsterdam had eliminated the *status quo* approach, only the two other options remained open.

First, the “bill of rights” came into being in the form of a Declaration of the European Parliament, the Council of Ministers and the European Commission proclaiming the Charter of Fundamental Rights of the European Union (“the Charter”) on 7 December 2000. Its legal status remained uncertain until the entry into force of the Treaty of Lisbon on 1 December 2009, which incorporated the Charter by reference in its Article 6.⁵

Next, the Council in June 2010, upon a recommendation from the Commission, authorised the opening of negotiations and a negotiating mandate for the accession of the EU to the ECHR. The ensuing negotiations resulted in April 2013 in an accession agreement. In July of the same year, the Commission requested an Opinion from the ECJ on whether the draft agreement was compatible with the Treaties.

The Court’s response was delivered by the full Court in Opinion 2/13 of 18 December 2014,⁶ which found the draft agreement to be incompatible with Article 6(2) TEU and its Protocol (No 8) thereto. The Court listed five grounds, of which probably the most prohibitive was that the draft agreement was liable to upset the underlying balance of the EU and undermine the autonomy of EU law.

At the present juncture, therefore, the legal basis of human rights and fundamental freedoms rest on Article 6 TEU.

The resulting situation is that seemingly overlapping human rights rules operate, in fact, in two separate legal frameworks. The Charter is binding within the Union and interpreted and applied by the ECJ, whereas the ECHR, on the other hand, is a product of the Council of Europe and is interpreted and applied by the European Court of Human Rights (“ECtHR”).

⁵ An adapted text of the Charter is published in O.J. 2012 C 326/391.

⁶ Opinion 2/13 EU:C:2014:2454.

2 The EFTA Court and Fundamental Rights

2.1 *The Historical Background*

The intended EEA court, as originally agreed by the negotiators, was to be functionally integrated within the ECJ and sitting with five judges from the ECJ and only three from the EFTA States. It would inevitably have lacked the same degree of independence as the EFTA Court has demonstrated for nearly a quarter of a century. Admittedly, the ECJ's Opinion 1/91⁷ dealt a stunning blow to the EEA negotiating process by declaring that the contemplated system for judicial supervision was incompatible with the Treaty Establishing the European Economic Community ("TEEC").

The ECJ's basic objection was that it was insufficient that the provisions of the EEA Agreement ("the Agreement") and the corresponding Community provisions were identically worded. The rules on free trade and competition, which the Agreement was seeking to extend to the whole territory of the Contracting Parties were part of a Community legal order to which the Member States had transferred sovereign rights, and which is developing. Its legal subjects are not only Member States but also nationals. However, the ECJ considered the EEA Agreement to merely create rights between its Contracting Parties (which later proved to be wrong), and not intended to transfer sovereign rights to its institutions (which was correct only as far as legislative powers were concerned).

Opinion 1/91 generated a lot of criticism, including from within the ECJ's own ranks.⁸ From these reactions one might be tempted to conclude that the ECJ in Opinion 1/91 perhaps had been a little overly inspired by the constitutional role it assumed in *van Gend en Loos*,⁹ and has pursued subsequently in other opinions regarding the relationship between EU law and that of other international legal systems, such as the ECHR.

The negotiators quickly recovered from this shock, and, in record time, redrafted the EEA Agreement into its present form, featuring a two-pillar system for judicial review and surveillance and a very elaborate system to maintain legal homogeneity at all levels.

⁷Opinion 1/91 ECR [1991] I-6079.

⁸See, for instance, the intervention by Advocate General Francis Jacobs in Report from the Fifth Nordic Conference on EFTA and the European Union, Helsinki 1994 (ISBN 951-96579-1-6), at page 37 et seq. The same publication also contains at page 187 et seq. an excellent overview by Sir Francis Jacobs of the development of the Community legal order through the case law of the ECJ and how far these features will apply also in the EEA.

⁹Supra footnote 1.

2.2 *The EFTA Court Finds Its Feet*

The immediate organisational effect of these changes was the establishment of two independent EFTA institutions under an agreement between the participating EFTA States: a Surveillance Authority, working hand in hand with the Commission and applying the same procedures, and a Court with clearly defined functional tasks.¹⁰ Prudently, the negotiators made no attempt to create a provision resembling Article 164 EEC.

However, the ECJ's remarks about the rationale of the EEA project served to fortify lasting misconceptions in those circles that, for a variety of reasons, opposed the concept. In my opinion, it was particularly the term "fundamentally improved free trade area", which was used to describe the Agreement in simple terms, that caused the most harm. The Agreement was not a free trade agreement, which in Community parlance is an instrument of the Common Commercial Policy, concluded on the basis of Article 113 EEC. Instead, the Agreement provides for a market with free movement of goods, workers, services and capital, equal conditions of competition and treatment of individuals and economic operators – in short – within its scope an extension of the Community's Internal Market to the participating EFTA States. Its legal basis was therefore Article 238 EEC which makes it "an association involving reciprocal rights and obligations, common action and special procedure". This makes the EEA Agreement what is commonly referred to as an "association agreement".

The revised EEA Agreement is so heavily focussed on assuring legal homogeneity, that some commentators consider that to be the primary objective of the Agreement, spawning reactions in the EFTA States, such as the notion of a "right" to opt out of new legislation. However, it follows from Article 238 EEC that the principle of reciprocity is equally important. This implies that homogeneity not only demands a common body of law that is interpreted the same way, but also the homogeneous application of that law.

However, misconceptions about the nature and objective of the EEA Agreement, and the way in which the system for ensuring the correct application of Internal Market legislation worked in the EU, had created persistent beliefs in most EFTA States that bad implementation was proliferate on the EU side, so that the EFTA States were actually being forced by the EFTA Surveillance Authority ("ESA") to over-fulfil their obligations. The impression of the Agreement being merely a traditional free trade agreement with less far-reaching objectives than the Community, led prominent lawyers and politicians to claim that it had be interpreted in accordance with traditional norms of public international law, as laid down in the Vienna Convention on the Law of Treaties. These perceptions emerged at a time when the EEA Joint Committee and ESA were still grappling with a backlog of several hundred legal acts, which had been added to the Agreement since the cut-off date in the negotiations.

¹⁰ Article 108 EEA and the resulting Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.

Unfortunately, this led to ESA being put under considerable pressure, both political and public, which on some occasions even contained personal criticisms. In due time such criticisms would also reach the EFTA Court, with even greater intensity and personal address.

2.3 *The EFTA Court Squares the Circle*

This represents the backdrop for the following short review of the way in which the EFTA Court has approached the subject of ensuring fundamental freedoms and human rights for individuals on the EFTA side of the EEA Agreement. The decisive shortcomings of the EU-EFTA Free Trade Agreements, as compared to the rapid development of the Community Internal Market, which was highlighted by the ECJ's judgments in *Polydor*¹¹ and *Kupferberg*,¹² was the inadequacy of the FTAs to ensure individual rights and national treatment in that market. The EEA Agreement, however, precluded the transfer of legislative powers from the EFTA States and, consequently, the application of the *van Gend en Loos* doctrine. The negotiators had been able to settle on only one aspect of that doctrine, namely the issue of primacy of EEA law set forth in Protocol 35 to the Agreement. But simultaneously, in Article 4 EEA a clear prohibition of any discrimination on grounds of nationality within the scope of application of the Agreement is formulated, and a specific emphasis on the equal treatment of individuals and economic operators and the judicial defence of their rights in the Preamble of the Agreement clearly signal that the negotiators wanted to record that these were agreed political objectives, for which normative texts were not yet fully, or adequately, developed.

This task fell automatically upon the EFTA Court, which solved the problem “in instalments”. Already in *Restamark*¹³ the Court had the opportunity to state that it intended: (i) to rely on the fourth and fifteenth Recitals of the Preamble of the Agreement which implicitly recognised individuals and business operators as capable of having rights and obligations under the Agreement; (ii) in its interpretation and application of the Agreement to adhere to the relevant rulings of the ECJ given prior to the signature of the Agreement under the terms of Article 6 EEA; and (iii) to pay due account to the principles laid down in relevant rulings of the ECJ given after that time, as provided for in Article 3(2) of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (“the SCA”). Equally important, the Court ruled, in answer to the question posed by the referring tribunal, was that Article 16 EEA “must be interpreted as fulfilling the implicit criteria in Protocol 35 EEA of being unconditional and sufficiently precise”.

¹¹ Case C-270/80 *Polydor Limited and RSO Records v Harlequin Record Shops Limited and Simon Records Limited* ECR [1982] 320.

¹² *Hauptzollamt Mainz v. Kupferberg & Cie KG a. A.* ECR [1982] 3641.

¹³ Case 1/94 *Ravintoloitsijain Liiton Kustannus Oy Restamark* [1994–1995] EFTA Ct. Rep. 15, Paras. 32–34 and 81.

This wording would, if pronounced by the ECJ, indicate that the provisions it related to would produce direct effect. However, at this juncture, the Court did not proceed that far.¹⁴

The next and final piece of the puzzle fell into place 4 years later in *Sveinbjörnsdóttir*,¹⁵ which dealt with the issue of State liability for loss or damage caused by failure to implement EEA law. This principle was established in the Community through the case law of the ECJ in 1982, relying largely on the special characteristics of the Community legal order.¹⁶ Before the EFTA Court, the Defendant, Iceland, claimed that the principle of State liability was not transferable to the EEA Agreement by virtue of Article 6 EEA. Even if the Court in these cases could not rely on any express provision instituting State liability, it found that the stated purposes and legal structure of the EEA Agreement in its Article 1(2), and the principle of homogeneity in its Article 4, were meant to ensure individuals and economic operators had equal treatment and conditions of competition with adequate means of enforcement. The EEA Agreement was a treaty *sui generis* going beyond what is normal for an agreement under public international law. There was no transfer of legislative powers involved, and the principle of State liability in the case of failure to implement must be seen as an integral part of the EEA Agreement.

A subsequent case, *Karlsson*,¹⁷ offered an opportunity for a rematch where the dualist States essentially repeated their arguments first raised in *Sveinbjörnsdóttir*. However, the Court confirmed that it was a principle of the EEA Agreement that an EFTA State is obliged to provide for compensation for loss and damage caused to individuals because of breaches of the obligations under the Agreement for which that State can be held responsible. While the Agreement does not entail a transfer of legislative powers, this principle must be regarded as an integral part of the Agreement as such, and not merely limited in use to directives.

These clarifications were defining moments in the discussions on the viability of the EEA concept, which had gained intensity after the accessions to the EU of Austria, Finland and Sweden in 1995. Apart from the moot point of direct effect which continued to be discussed, at least in legal circles, the more pertinent question still loomed: whether the two-pillar structure, which now more resembled that of a Greek column and a matchstick, really would be able to produce the reciprocity required by the Agreement. However, crucially, the EFTA Court had now confirmed that provisions of the Agreement, when implemented, in material terms were fully

¹⁴ Incidentally, this formulation became of great importance to the work of ESA because it directly indicated the salient points to look for in implementation control and prevented a looming conflict with EFTA/EEA governments over the interpretation of Article 7(b) where their choice of “form and method of implementation” often tended to be taken to apply as well to the material substance of the Directive in question.

¹⁵ Case E-9/97 *Erla Maria Sveinbjörnsdóttir v Iceland* [1998] EFTA Ct. Rep. 95.

¹⁶ Case-8/81 *Becker v. Finanzamt Münster-Innenstadt* [1982] ECR 537 and *Francovich*, Joined cases C-6/90 and C-9/90 [1991] ECR I-5401.

¹⁷ Case E-4/01 *Karl K. Karlsson Hf* [2002] EFTA Ct. Rep. 240.

capable of ensuring for individuals and business operators reparation for damage and loss on the same terms as those which existed in the EU.

In addition, in the EFTA pillar the enormous backlog of unimplemented legal acts was being eliminated rapidly to the point that the EFTA States topped the scoreboards introduced by the Commission as part of the Internal Market Action Plan towards the end of the 1990s. In *Ospelt*¹⁸ the ECJ confirmed that it followed from the EEA Agreement that national measures are no more exempt than under Community law, or in other words, the EEA Agreement assured reciprocity.

2.4 *The EFTA Court Applies Fundamental Rules in Social Policy and Labour Law*

In the same period, the EFTA Court started to rely explicitly on the provisions of the ECHR in a great variety of cases starting with *TV 1000 Sverige AB*¹⁹ and *Technologien Bau- und Wirtschaftsberatung*.²⁰ A particularly clear policy statement can be found in *Ásgeirsson*,²¹ where the Court recalled that on earlier occasions it had found that provisions of the EEA Agreement, as well as the procedural provisions of the SCA, were to be interpreted in the light of fundamental rights, and went on to declare that the ECHR and the judgments of the ECtHR were important sources for determining the scope of these rights.

The EEA negotiations on social policy and labour law were substantially influenced by the conflicts between the British Government and the rest of the Community, which is described above at point 1.2. The basic provisions in Part V of the Agreement do not go beyond the text of the Single European Act, except for the encouragement in Article 71 EEA to promote the dialogue between management and labour at European level. However, the eleventh Recital of the Preamble of the Agreement contains a strong emphasis on the importance of the development of the social dimension, and Article 96 EEA, instituting the EEA Consultative Committee, established a forum for strengthening contacts and cooperation between the social partners in an organised and regular manner.

Moreover, in a unilateral Declaration recorded in the Final Act of the EEA Agreement, the Governments of the EFTA States undertake to actively contribute to the development of the social dimension of the EEA, and specifically endorse the principles and basic rights laid down in the Charter of Fundamental Social Rights for Workers of 9 December 1989.

It does not appear that the disagreement within the Union that left its mark on both the Treaty of Maastricht and the Treaty of Amsterdam, has in any way affected

¹⁸Case C-429/01 *Margarethe Ospelt und Schlössle Weissenberg Familienstiftung* [2003] ECR I-9745.

¹⁹Case E-8/97 *TV 100 Sverige AB* [1998] EFTA Ct. Rep. 68.

²⁰Case E-2/02, *Technologien Bau- und Wirtschaftsberatung and Bellona* [2003] EFTA Ct. Rep. 37.

²¹Case E-2/03 *Ásgrímsson* [2003] EFTA Ct. Rep. 185.

the homogeneity of EEA rules. Neither has it prevented the EFTA Court from applying fundamental rights in the fields of social policy and labour law.

It remains to be considered, however, whether the adoption of the Charter will have any effect in the fields where it overlaps both legal systems. Obviously, the EEA Agreement is not affected in areas where the Charter goes beyond its material scope and competences of the EFTA Court. Leaving aside the issue of the implementation of Article 6(2) TEU, which is an internal EU concern, it remains a fact that the Charter to a considerable extent overlaps fundamental rules and material provisions, which the two legal systems have in common. This possible complication seems to be solved by Article 51(2) of the Charter which declares that it “does not extend its application beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks defined in the Treaties”. This would then mean that the Charter has not changed Union law relevant to the EEA as it stood and will not change the normal development of Union law relevant for the EEA in the future.

It seems that the EFTA Court is aware of this when in paragraph 86 of its judgment in *Posten Norge*,²² when dealing with the principle of effective judicial protection including the right to a fair trial, the Court refers directly to the ECHR and judgments of the ECtHR, but merely notes “that expression to” this principle is now also given by Article 47 of the Charter.

As for effective judicial protection, individuals and business operators in the EEA/EFTA States could seek recourse to protection from the ECHR in two ways, either through the adherence of their home State to the Convention, or through its application by the EFTA Court in conflicts involving EEA law.

2.5 *The Relationship with National Courts*

The application and enforcement of EEA law is a national competence, thus following the traditional norms of public international law. From this follows the principle of national procedural autonomy. In the EU, this principle is conditioned by the duty upon national courts under the circumstances outlined in Article 267 TFEU to refer questions to the CJEU for a preliminary ruling, which is binding on the national court. The jurisdiction of the EFTA Court is in such instances, pursuant to Article 34 SCA, limited to giving advisory opinions on the interpretation of the Agreement. The national courts are, however, not bound by this provision, neither to make such a referral, nor to follow the advice of the EFTA Court.

If then the Court’s ensuing judgment results in a State failing to apply the EEA law correctly, this may constitute an infringement of EEA law for which the State in question will be responsible. Whether or not this will have such a consequence, depends very much on the vigilance and capacity of ESA to initiate a direct action before the EFTA Court, which finally may result in a binding decision.

²² Case E-15/10 *Posten Norge v. EFTA Surveillance Authority* [2012] EFTA Ct. Rep. 246.

The same situation arises where the referring court chooses to disregard the advice of the EFTA Court, or when it permits the parties to involve it in undue and time-consuming arguments before it decides to refer questions to the EFTA Court. As it appears, such behaviour may not only qualify as infringements of the principle of loyalty,²³ but also constitute a denial of the fundamental freedoms and human rights, which was established as an undisputed part of both EU law and the laws of the EFTA States long before the EEA negotiations.

It is perhaps one of the EFTA Court's greatest feats that, by means of patient dialogue and persuasion, it seems to have convinced the highest courts of the States of its jurisdiction that it is not incommensurable with their independence or the sovereignty of their nations to co-operate loyally in a European system of courts, united in the task of ensuring equal individual rights on the basis of common legal standards set by the EEA Agreement and European constitutional traditions, which defend fundamental freedoms and human rights.

3 The Legacy

In her keynote speech at the Twentieth Anniversary of the EFTA Court, Ms. Viviane Reding, a Member of the European Parliament and former Vice-President of the European Commission, unconditionally acclaimed the contribution of the EFTA Court to the workings of the judicial mechanism of the EEA, *inter alia*, particularly stressing its rulings ensuring fundamental rights, thus contributing to a more comprehensive EEA law protecting the rights of citizens.

Viviane Reding also remarked that while the EFTA Court is a small institution, it is yet efficient, diligent and proficient. Nevertheless, despite having proved its maturity, there is no time for it to sit on its laurels.

Yes, admittedly the EFTA Court is a small institution and inherently vulnerable to changes in its leadership, particularly in the form of the departure of a President who has formed its policy, public profile, and proficiency during the better part of its life. The Court is independent, but not shielded from political pressures and interference in its nomination processes. It will be up to the future Members of the Court to resist such tendencies. This may prove just as challenging as their principal task of ensuring the application and enforcement of "the Law".

Reference

Report from the Fifth Nordic Conference on EFTA and the European Union (1994) Helsinki

²³ E-18/11 *Irish Bank Resolution Corporation Ltd v Kaupthing hf*, [2012] EFTA Ct.Rep. 1178, paras. 57, 58 and 63.

European Courts and the Protection of Fundamental Rights



Antonio Tizzano

1 Introduction

As is well known, judicial forums on a continental or national level have been coexisting in Europe for some time now, occupying overlapping areas of jurisdiction – whether actually or potentially – without their respective relationships being defined in strict or unambiguous terms. In the field of fundamental rights, more specifically, this coexistence is reflected in a triangle of sorts, which developed with the European courts at one side, the Luxembourg court and national courts at another side, and the Strasbourg and national courts at yet another side: each of them being within their rights to deal with the protection of fundamental rights.

But it does not end here. Besides this plurality of courts, the number of official texts dealing with the subject has also increased: the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter “ECHR” or “Rome Convention”), signed in Rome in 1950; the Charter of Fundamental Rights of the European Union, proclaimed in Nice in 2000 (hereinafter the “Charter of Fundamental Rights” or the “Nice Charter”), though it formally became binding only with the entry into force of the Lisbon Treaty on 1 December 2010; and the national constitutions. The plurality of courts I just referred to is hence required both to comply with and to ensure the respect of a variety of legal texts, which do not always provide for corresponding forms and levels of fundamental rights’ protection.

Accordingly, it seems fairly natural that all of this leads to some difficulties, and even to the risk of conflict, as I have already had the opportunity to stress on other occasions. I should like here to continue this discussion in order to update the analysis, something which I am doing willingly to honour a scholar, Carl Baudenbacher, who has worked on these issues with his usual seriousness and clarity.

Vice-President of the Court of Justice of the European Union.

A. Tizzano (✉)

Court of Justice of the European Union, Luxembourg City, Luxembourg

2 Nature of the Dialogue

I should like to begin by stating that the relationship between the Court of Justice of the European Union and the national supreme jurisdictions, which had not been easy initially, is one of the sides of the abovementioned triangle that nowadays raises fewer problems than the others. In fact, the first reactions, notably by the national supreme courts, were rather timid and often marked by a certain mistrust, if not on a confrontational attitude. Without discussing this point any further, I shall simply say that such reactions were caused by differences of a formal nature, and, more importantly, by the claim to supremacy of the respective judicial systems, which led to defining the relationship between these courts based on the idea of a hierarchy.

Judicial practice eventually swept away such an idea and showed that those relationships could not be defined in terms of “supremacy”, but rather in terms of “cooperation”. This cooperation was rendered necessary also by the fact that the relationships between the judicial systems concerned have become so intricate on a structural level that it is no longer possible to perceive them in a vertical sense; on the contrary, for many reasons, it is preferable rather to conceive them as relationships, as it were, of a circular nature.

Over time, however, the abovementioned reactions progressively transformed into an attitude of convinced cooperation, with the result that in practice the relationship between those courts has on the whole progressed very positively. While it is indeed true that each of them has developed, as already stated, its own case-law “monologue”, it is also true that this has to date not created significant problems, and it may be considered that in the future insurmountable difficulties are unlikely to occur as well.

This is even more so now that the practice of institutionalised dialogue between the national courts and the Luxembourg court is spreading. In fact, as stated earlier, even though a dialogue between those courts has been established for some time now, and with very positive results, this initially remained an informal one, because of the reluctance of many constitutional courts to develop it in institutional terms, i.e. through specific treaty instruments, and in particular the preliminary reference mechanism set up by Article 267 TFEU. The situation has however significantly evolved, and today many constitutional courts do not hesitate to make such references.

On the other hand, the relationship between the Strasbourg court and the national constitutional courts appears to be less straightforward. There are notable differences between the legal basis and effects of EU law and of the decisions of the court in Luxembourg, on one side, and of the Rome Convention and the Strasbourg court decisions, on the other. Take Italy as an example. The Italian Constitutional Court has consistently held that judgments of the European Court of Human Rights (“ECtHR”) do not produce the same direct effect on the Italian legal order as those from the Luxembourg court. The latter, as is well known, requires national judges to set aside the application of national laws incompatible with EU law. On the

contrary, if a conflict arises between national law and the Rome Convention, which cannot be solved through interpretation, a specific intervention by the Constitutional Court is needed in order to give full effect to the judgments of the Strasbourg court. This obviously undermines the effectiveness and functioning of those decisions, and gives rise to difficulties in the relationships between the courts in question.

On this point, I should however note that a recent decision of the Italian Constitutional Court seems to have made the distinction between the effects of the Charter of Fundamental Rights and of the Rome Convention less watertight than it appeared to be (see decision n. 269/2017 of 7 November 2017). In fact, the Constitutional Court has clarified that if a judge considers that a provision of Italian law is incompatible with one of the rights or principles enshrined in the Charter as well as with the corresponding provisions of the Italian constitution, he or she cannot directly set aside the application of the national law provision. It is first necessary to submit a preliminary reference on the compatibility of that provision with the Italian constitution to the Constitutional Court. The latter will then decide whether such provision respects the fundamental rights protected by the Italian constitution and/or by the Charter – leaving however the right (and the obligation) of the judge *a quo* to submit a preliminary reference on the interpretation of the Charter to the Court of Justice unaffected. Evidently, this priority mechanism bears a strong resemblance to the one applicable to alleged incompatibilities between Italian law and the ECHR, that I just described above. It goes without saying that it raises similar concerns with regard to the effectiveness of the EU law provisions concerned. But this is not the appropriate context to elaborate any further on the consequences of the decision of the Constitutional Court.

3 The Relationship Between the Court of Justice and the European Court of Human Rights

The relationship between the two European courts (the Luxembourg and Strasbourg ones) could surely have become more simple (or complicated!) after the entry into force of the Lisbon Treaty, which envisages the accession of the EU to the Rome Convention. As is well known, an agreement to this effect had even been prepared, but, when submitted to the Court of Justice, it was rejected by the latter on grounds upon which there is no need to dwell at this stage (see Opinion 2/13 of 18 December 2014).

Without reopening this issue, I would nevertheless like to emphasise that the background to the relationship between the two European courts goes well beyond the issue, central to that agreement, of identifying a mechanism that could ensure the prior involvement of the Court of Justice in those situations where both courts enjoy jurisdiction. This issue is but one of the aspects – even if one of the most important – of this relationship. I believe, however, that these aspects, because of their very nature and the implications they carry, should be perceived within a more

general and systemic context, keeping in mind the evolution that has taken shape in Europe in the structure of the relationships between the European and national courts. It is worthwhile, therefore, to develop some considerations in this regard.

First of all, I note that the situation that we are now examining is actually very similar to that which for decades has characterised – and to a certain extent still does – the relationships between the Court of Justice and the supreme national courts. Despite there clearly being non-negligible differences in this regard, I believe that the experience acquired over time as regards these relationships, as well as the in-depth analysis that academics have conducted in this field, can help us understand the real sense of the problems at stake.

On this subject, I recall, above all, that many uncertainties and even notable problems emerged for some time also in the relationships between these courts. As stressed above, in fact, in the past national supreme courts were hesitant to engage into a formal dialogue with the Court of Justice. But over time reluctancies have been overcome and replaced by a markedly cooperative attitude, which flourished into a fruitful dialogue, at times even institutionalised, between the various courts.

I believe that there is no reason why even the relationship between the two European courts should not develop, as indeed has happened to this day, on the same lines and in a climate of mutual trust.

As I already stressed, despite the fact that the EU was not and still is not a contracting party to the ECHR, the Court of Justice has nonetheless considered itself bound by the case-law of the ECtHR, and this clearly not for reasons of any formal supremacy. The result is that the “horizontal” relations between the two courts, based on a type of arrangement somewhere between general and special, have produced results that were globally positive; and, in any case, they have not caused serious problems.

It would therefore be necessary to prevent this situation from undergoing alterations as a result of a transformation in the nature and the climate of the relationship between the two courts. But this presupposes the denial of the thesis according to which, after accession, this relationship should be defined on a “vertical” and “hierarchical” level. In fact, although this might appear to some to be a practically automatic consequence of the – for now – delayed accession, I believe that any attempt (or... temptation) to develop these relationships in this manner would reveal a poor understanding of the tendencies that emerge from the evolution, described above, of the relationships between the supreme courts in Europe.

It is, moreover, to be feared that structuring these relationships vertically, rather than avoiding difficulties between the two courts, would actually favour the emergence of such difficulties, if not indeed of real conflicts between them. If ever this path had to be taken, there would be the risk of being caught up in a perverse mechanism without a solution, even more so when it is considered that each of the two courts possesses its own discretion and the means to drag an eventual conflict out infinitely.

4 Benefits of a “Cooperative” Approach

In this connection, it is perhaps opportune to emphasise that a “cooperative” approach would be beneficial not to one court or to the other, but equally to both. Although the issue is usually expressed in terms giving the impression that a solution should be found in the “interest” of the Luxembourg court and its powers, I believe that the two courts share a common “interest” in the matter.

In this regard, it is useful to recall, once again, the evolution which has characterised and continues to characterise the relationships between the Court of Justice (but, partially, even the ECtHR) and the supreme national courts. Amongst the reasons for this evolution must be included precisely the idea that cooperation was (and is) indispensable because each one of these courts maintains a margin of competence and autonomy with regard to the protection of fundamental rights and to the effects of the decisions of the “other” court.

On this point, I will mention only the implications of the so-called “counter-limits” doctrine, which emerges from the case-law of nearly all supreme national courts and which was (and still) is widely debated on an academic level. As is well known, this doctrine consists essentially in restricting, from a national point of view, the extent of the limitations to sovereignty imposed by the process of integration, by establishing limits... to these limitations (as the name goes, “counter-limits”), and by allowing the national constitutional courts to have the last word when it comes to reviewing whether these limits have been observed.

In particular, while recognising the primacy of EU law, a number of national courts have reserved for themselves the right to declare the unconstitutionality of the laws ratifying the treaties in those cases where the application of EU law would endanger the protection of fundamental rights enshrined in national constitutions or of the “fundamental principles,” the “core values,” “the constitutional identity,” “the democratic nature,” etc., of their States. This has been done even despite the risk that such a reaction could put in jeopardy the very participation of the State in the process of integration. And, as the recent judgment of the Court of Justice *M.A.S. and M.B.* (5 December 2017, C-42/17) shows, on the one hand, supreme national courts will not shy away from invoking “counter-limits” to safeguard their prerogatives as guarantors of the fundamental rights protected by the national constitutions. On the other, the Court of Justice will not be deaf to such claims, but it will find a way to ensure that the protection of the rights at stake does not undermine the primacy and effectiveness of EU law.

Now, while it is true that this applies to a very limited number of cases (as are those that I have just mentioned), it is not inconceivable that the Court of Justice could react in the same manner with regard to a decision of the ECtHR in order to safeguard observance of the fundamental and identity principles of the EU. It may in fact be wondered whether, following a decision from Strasbourg, the Court of Justice does not nevertheless retain jurisdiction to ascertain, amongst other matters, whether the criteria established in the Treaty and the Protocol as conditions for accession have been satisfied (these criteria would obviously need to be confirmed

in the Act of Accession). Such jurisdiction could in particular be invoked with regard to the specific nature of EU law, the competences of the EU, the powers of its institutions, especially those of the Court of Justice, the competences shared between the EU and its Member States, and the extent of the latter's obligations.

It could be added that a similar reaction would be possible even if the identity and fundamental principles of a Member State were to be challenged by a decision from Strasbourg. As is well known, in fact, the Lisbon Treaty explicitly obliges the Union's institutions to, amongst other things, respect "[the] national identities [of Member States], inherent in their fundamental structures, political and constitutional" (Article 4(2) TEU).

Furthermore, it is to be borne in mind that the areas covered by the European instruments for the protection of fundamental rights do not coincide completely, in the sense that the protection afforded by the EU legal order is broader than the one ensured by the ECHR. This is so, firstly, because it could concern rights that are more far-reaching than those enshrined in the Rome Convention. In fact, when it states that the fundamental rights as guaranteed by this Convention, besides those resulting from the constitutional traditions common to the Member States, "shall constitute general principles of the Union's law," Article 6(3) TEU clearly shows that the ECHR is not the sole source to be taken into consideration in this field and that other fundamental rights could be included in the category of "general principles" of the Union. After all, the Charter of Fundamental Rights specifically provides that the provisions and principles contained therein cannot be interpreted in such a way as to restrict or adversely affect rights and freedoms recognised by EU and international law – including international agreements (such as the ECHR) to which the EU and its Member States are party – and by the Member States' constitutions (Article 53). Secondly, this is so because the Charter, while insisting that the rights contained therein should be interpreted in conformity with the ECHR, further states that EU law may provide "more extensive" protection for these rights (Article 52(3)).

However, difficulties can emerge also from the interplay within the national legal systems, in particular with regard to the effects of judgments delivered by the Court of Justice and of those of the ECtHR. Indeed, as already noted, in certain Member States such effects can be quite different. If we take back the example of Italy, judgments delivered by the Court of Justice – similarly to all provisions of EU law with direct effect – are immediately effective, which implies that national courts are obliged to set aside the application of national law provisions that are incompatible with EU law. On the contrary, only the Constitutional court (besides, obviously, the Italian legislator) may disapply such provisions when they are deemed to be incompatible with the ECHR by the court in Strasbourg. Hence, at least as a matter of principle, in a situation where the two courts differ – and until such differences are resolved – the decision of the court in Luxembourg would produce its effects while the one delivered by the ECtHR would produce little or no effect for a certain period of time. This obviously gives rise to uncertainty for all parties concerned by those decisions.

5 An Interactive Rather Than Hierarchical Relationship

Therefore, a discussion focused on the formal and hierarchical relationship between the two courts runs the risk of creating a vicious circle of difficulties, of sending discordant or ambiguous messages to the national courts and, ultimately, of harming citizens' interests.

I believe, on the contrary, that accession should allow the creation of a dynamic relationship between the court in Luxembourg and the court in Strasbourg based on cooperation and complementarity, within an integrated system of protection of fundamental rights focused on identifying the most appropriate solution for strengthening a sort of "circular" protection. In other words, the relationship between these two courts would remain, as has been said with regard to the relationship between the EU and its Member States, "interactive rather than hierarchical."¹

There are also other considerations that encourage this approach, considerations that in my view have not received the attention that they really deserve. First of all, it should be emphasised that here the possible differences that may emerge relate to the definition of a fundamental right and to the quality of its protection, and therefore to a problem concerning the clarification of the content and the scope of these rights. In other words, the issue in question is not so much the risk of formal conflicts between rules and/or judicial institutions, but rather the risk of "disputes" concerning the content of the values that the courts are supposed to protect.

However, it is my belief that such a conflict cannot be solved on a hierarchical basis, insofar as no one can consider himself to be, by definition, in possession of the "best values". The important issue, therefore, is not "who" is entitled to have the final word but rather, how should I say (or... try to say), the "best" word. And this as a rule requires a shared effort in order to find a common definition of the values in question, or in order to reconcile any disharmony between values that differ but are in principle equally deserving of protection.

This is all the more so given that the real scope of these values, like the definition of their reciprocal compatibility, does not always emerge clearly from the texts. The provisions of the Convention and of the Charter, like those of almost all documents of the same nature, are in fact drafted very generally and, in some cases, even generically. Moreover, they cannot be said to be set in stone, in the sense that their real scope is affected by changes and developments of the system (and not only of the legal order) of which they form part. In other words, as has been effectively observed, they can be compared to a musical score whose notes can, for the most part, be played, especially over time, in different keys and produce multiple musical harmonies.

Therefore, at the end of the day, it will be practice, in particular that adopted by the courts, that will enable the scope of the protected rights and values to be specified concretely, with the consequence that the texts risk being worth less in terms of what they say than for the way the competent courts interpret and apply them over

¹ MacCormick (1999), p. 118.

time. Without wishing to be iconoclastic, it could be said that in this respect courts are actually more important... than the charters themselves.

However, for the purposes of the issue at stake here, it is in fact the existence of these wide elements of discretion in defining the rights and values in question that should assist the courts concerned to find a solution to any problems they face in their reciprocal relationships, insofar as any one of them can “listen” to the others and apply, if necessary, the appropriate adjustments and balances in order to reach a shared solution.

Accordingly, a cooperative relationship between the courts in question would result in considerable benefits for all, and in particular for the two European courts. On the one hand, in fact, such relationship would strengthen the Luxembourg court’s practice of taking into account the case-law of its counterpart in Strasbourg; on the other, it would allow the latter to take into consideration the reference values of the Court of Justice and of the system which inspires such values. This, obviously, is not without its relevance if it is borne in mind, for instance, that the ECtHR should, as a rule, keep in highest regard the prevailing *opinio juris* and the *common standards* in those States that are party to the Convention, and that the EU Member States are an essential part of those States. Furthermore, while the abovementioned duty to ensure, within the EU, the most “extensive” protection of fundamental rights formally apply only to the Court of Justice, it should evidently be taken into consideration by the other court too: this would both prevent a weakening of the fundamental rights’s protection and smooth out the relationships between the two courts.

6 Benefits of an Institutionalised “Dialogue”

It is true that such relationship could develop still more fruitfully if the “dialogue” between the two courts could rely on institutional mechanisms apt to enhance it. With regard to the relationship between the court in Luxembourg and the national courts, it is well known that such a mechanism exists, insofar as the preliminary reference procedure can be used in this context. On the other hand, with regard to the relationship between the two European courts, such a mechanism is not provided for in the texts even though, as has already been mentioned, a number of proposals were made in order to introduce, at least in certain cases, something similar.

However, it is not to be forgotten, on the one hand, that the “dialogue” between the Court of Justice and the national courts developed, albeit informally and indirectly, even before they decided to avail themselves of the preliminary reference and, on the other hand, that the mechanism proposed for this purpose with regard to the relationship between the two European courts (whatever it might be), would cover only specific cases which, although without a doubt important, would not include all the various situations that can arise within the framework of this relationship.

This means, in other words, that even if for the purposes of the dialogue between the courts the institutionalisation of specific procedures would surely be a very effective instrument, such institutionalisation is, first, not strictly necessary and, second, it cannot even be considered to offer a solution for all problems, insofar as the possibility thereby offered to the courts of communicating directly does not exclude the risk of differences when the same courts do not subscribe, on a more general level, to the logic underlying such a system.

In this sense, the search for a formal mechanism that would ensure the prior involvement of the Luxembourg court in the cases examined above, while being legitimate and opportune, could also be considered to be a secondary issue. Indeed, what really matters in this context is the global approach of the two courts, their ability to ensure openness in a stable, continuous and effective manner and the efforts to adjust their respective case-law.

The issue, manifestly, is not to seek perfect harmony between these courts, particularly because, by its very nature, the definition of values is enriched more by a plurality of contributions rather than by uniformity. The possibility of contradictions, therefore, cannot be excluded: on the contrary, albeit to a certain extent, such contradictions can in certain cases be considered physiological – and besides they occur also within the national legal systems – even though these are normally structured vertically and “hierarchically”.

Nor is the issue at stake that of necessarily ensuring an immediate and definite solution for any conflict. The issue is rather that of ensuring the informal development of a “European judicial dialogue” which, as has been very well put, “manages conflict over time in a process of constant ‘mutual accommodation.’”²

From this perspective, therefore, one can indeed speak of a real constitutional function exercised by the high courts concerned, on a European and on a national level, in the twofold sense that, on the one hand, all these courts contribute, as we shall shortly see, to the definition of fundamental shared values and, on the other hand, they themselves create the rules (or rather, the practice) for finding a solution for any differences that (until now) it was not possible, due to a lack of capability or will, to settle in an institutionalised manner.

7 Conclusions

The considerations above equally apply to the relationship between the two European courts. First of all, the ECtHR is not an entity external to the process that I have mentioned; on the contrary, it already participates in the “dialogue” with the other European courts, and there is no reason why it should not continue to participate, even to a greater extent, in the future.

It is true that, as we have seen, some problems could arise because of the fact that the two courts deliver their judgments at different junctures and that, in certain

²Torres Pérez (2009), p. 111.

cases, their positions might not coincide. In reality, this situation is unlikely to arise when the ECtHR delivers its judgment before its counterpart in Luxembourg, insofar as – as I have already observed on several occasions – the latter follows, as a rule, the case-law of the other. On the other hand, such situation could arise less rarely in the inverse situation, in other words, when the ECtHR, asked to give a decision after the Court of Justice, does not agree with the latter's reasoning.

I am convinced however, in light of what I have said so far, that the ECtHR will endeavour to avoid contradicting the case-law of its counterpart in Luxembourg, or at least contradicting it in an openly conflicting manner. Even if it does not agree with the Court of Justice's case-law, the ECtHR in fact has adequate means of expressing its own different opinion, and also of operating in the direction of gradual adjustment of the two lines of thought, precisely in order "to manage the conflict over time".

In other words, I remain convinced that the relationship between the two courts will continue to develop positively and constructively. Both courts are well aware that the real issue is to manage this relationship, not with the aim of establishing the respective hierarchies but with the aim of ensuring a better protection of fundamental rights.

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Fundamental Rights and Fundamental Law: The 2014 Revision of the Norwegian Constitution



Toril Marie Øie and Henrik Bull

1 Introduction

When the Norwegian Constitution was adopted in 1814, the terms “fundamental rights” and “human rights” were not to be found in the text. Nevertheless, the Constitution – which is among the oldest written constitutions in Europe – did contain some provisions based on the idea of fundamental rights and freedoms.¹ In the eyes of present-day observers, however, this “catalogue” of rights would seem inadequate.²

Today, the Constitution has an entire chapter devoted to human rights, containing a large number of provisions. Most of the new provisions were adopted by the Norwegian Parliament, the *Storting*, on 13 May 2014 in connection with the 200th anniversary of the Constitution. These provisions were based on a proposal from a legislative commission appointed by the Storting in 2009, usually referred to as the “*Lønning Commission*”.³ The report issued by the Lønning Commission⁴ and the subsequent proposals to the Storting prepared by the Storting’s standing committee on constitutional affairs⁵ give a unique insight into the discussions leading up to the constitutional reform.

Since the mid-1800s, Norwegian courts have controlled whether acts and other regulations and decisions passed by the legislative and executive branches of

Chief Justice of the Supreme Court of Norway, and Justice of the Supreme Court of Norway, respectively.

¹ Andenæs and Fliflet (2006), p. 95.

² Smith (1990), pp. 1–14. See doc. 16 (2011–2012) section 4.4.

³ Hereinafter the Lønning Commission or only the Commission. The chairman of the Commission was Professor Inge Lønning.

⁴ Doc. 16 (2011–2012).

⁵ In particular, Innst. 169 S (2012–2013), 182 S (2013–2014), 183 S (2013–2014), 184 S (2013–2014), 185 S (2013–2014), 186 S (2013–2014) and 187 S (2013–2014).

T. M. Øie (✉) · H. Bull (✉)
Supreme Court of Norway, Oslo, Norway

government are consistent with the Constitution.⁶ However, the courts' right and duty to ensure such consistency were enshrined in the Constitution itself only in 2015. Until then, this was considered customary constitutional law. The inclusion into the Constitution of a number of new rights in 2014 also entails a de facto extension of the courts' powers: the courts may, indeed must, exercise control of the compliance also with the new human rights provisions.

The new provisions are to quite some extent based on international human rights instruments. This means that the provisions may be interpreted in light of the case law of international bodies charged with the interpretation of those instruments. However, a specific national interpretation of the provisions may also be called for under certain circumstances. Whether or not the Supreme Court will actually sever the interpretation of the constitutional provisions from the international provisions that have inspired them is a different matter. As opposed to the often dynamic interpretation by international courts⁷ of various conventions and international agreements, Norwegian courts have traditionally shown restraint in their interpretation of the Constitution. We will revert to this issue in Sect. 5.

While judicial control is deeply rooted in Norwegian law, its actual impact on the decision-making of the other branches of government has varied throughout the years. This may have several reasons, one of them being that the Constitution had, until 2014, a limited human rights catalogue. Another may be that Norwegian courts have traditionally been reluctant to challenge the legislature's own assessment of the constitutionality of its legislation and other political decisions.⁸ This has changed, in particular from 2006 onwards.

In this article, we give an overview of the development of the human rights protection in the Norwegian Constitution, focusing on the 2014 reform. We will also make some observations on the Supreme Court's approach to the new human rights provisions.

2 Human Rights and the Constitution Prior to the 2014 Revision

Until the reform of 2014, the Constitution offered only a fragmented protection of human rights. It contained only a limited number of rights, and the provisions setting out those rights were not placed in any particular order in the Constitution.⁹ Most of them originated from 1814 and, until 2014, few were added.¹⁰ The original

⁶Supreme Court ruling in Rt-2007-1281 (*Øvre Ullern*) paragraph 73, and Bårdsen (2015), pp. 291–316.

⁷For example, the European Court of Human Rights and the Court of Justice of the European Union.

⁸Smith (1993), p. 239.

⁹Doc. 16 (2011–2012) section 1.1.

¹⁰See Doc. 16 (2011–2012) section 4.5 for an overview.

provisions reflect the views on fundamental civil rights prevailing at the time, such as freedom of expression, the principle of *nulla poena sine lege*, the prohibition against confiscation of property as punishment, the prohibition against torture, the prohibition against retroactive effect of legislation, and the right to full compensation in expropriation cases. Their primary function was to restrict government action.¹¹

A genuine interest in human rights did not arise among Norwegian lawyers in general until the late 1980s, despite the fact that Norway, at this point, had already been bound by human rights conventions for years. Instrumental in this development was the European Convention on Human Rights (“ECHR”), whose content was further clarified and developed through the case law of the European Court of Human Rights (“ECtHR”),¹² but lawyers also became increasingly conscious of other human rights instruments.

In 1989, a committee was appointed to study the implementation in Norwegian law of human rights obligations under international law. Until then, implementation had been somewhat haphazard: in connection with ratification, one had mostly concluded that no legislative action was required since Norwegian law appeared already to fulfil the requirements of the convention in question.¹³

The committee recommended that the most important human rights conventions be incorporated into Norwegian law through a separate act of parliament, stating that the conventions in question were to rank on par with other acts of parliament.¹⁴ This was considered the most loyal method of implementation – a conclusion that the Ministry of Justice later supported.¹⁵ The committee also discussed whether a more comprehensive human rights catalogue should be added to the Constitution, but rejected that idea, as it would fall outside the committee’s mandate to propose constitutional changes of such a scale.¹⁶

What the committee did propose, however, was to include a new provision in the Constitution that referred to human rights in general, but left implementation to ordinary acts of parliament. The committee considered that such a provision would better reflect the significance of human rights in a modern society.¹⁷

¹¹ Doc. 16 (2011–2012) section 4.4.

¹² Indreberg (2015), pp. 394–395.

¹³ NOU 1993: 18 section 1.1.

¹⁴ NOU 1993: 18 section 7.4. In Norway, the common view has been that international and internal law are in principle two different legal systems (dualism), and that a separate act of implementation must be adopted before international law can have the status of national law. This act of implementation may have the form of an act of parliament or a subordinate regulation. In practice, however, Norwegian courts have attached great importance to international law when interpreting and applying Norwegian law, without much concern for whether the obligations have been formally implemented.

¹⁵ Ot.prp. No. 3 (1998–1999) section 6.1.4.

¹⁶ NOU 1993: 18 section 10.1.

¹⁷ NOU 1993: 18 section 10.5.

In 1994, such a provision on human rights was included in the Constitution as a new Article 110c.¹⁸ With this provision, the term “human rights” was introduced in the Constitution for the first time.¹⁹ Today, Article 92 has much the same content as the old Article 110c.²⁰ The relationship between the Article 92 and the new constitutional provisions on human rights enacted in 2014 led to problems of interpretation that the Supreme Court had to deal with in the *Holship* case,²¹ discussed below in Sect. 6.

In 1999, a Human Rights Act was adopted in accordance with the new constitutional provision and the committee’s proposal. Pursuant to section 3, cf. section 2, of the Act, the provisions of specific conventions and protocols shall take precedence over any other legislative provisions that conflict with them. This was inspired by the EEA Act section 2, which in turn implements Protocol 35 to the EEA Agreement. Since the primacy provision is only set out in ‘ordinary’ legislation, it cannot in principle prevent the Storting from making exemptions in subsequent legislation. Thus, the Human Rights Act does not have the same effect as enacting the same rights at the level of the Constitution itself.

In 2008, the political parties at the Storting entered into an agreement to adopt amendments to the Constitution that would further strengthen the impact of human rights. The agreement formed part of a settlement regarding a reorganisation of the relationship between the state and the Norwegian Church, i.e. the dominant Lutheran church that had been a part of the state apparatus since the Reformation. One of the changes that was adopted was the inclusion into Article 2 of a provision declaring the safeguarding of human rights as a defined goal for the Constitution itself.

A more general inclusion of human rights in the Constitution was regarded as a natural continuation of this new provision.²² The Lønning Commission was, as mentioned above, appointed by the Storting in 2009 to “examine and propose a limited revision of the Constitution with the object of strengthening the position of the human rights by incorporating central rights into the Constitution”. The Lønning Commission issued its report in December 2011, preparing the ground for the changes to come.

3 Enforcement and Control of Human Rights

As mentioned in the introduction, the courts’ authority to review whether the decisions of the other branches of government are consistent with the Constitution has long been a crucial part of rule of law in Norway.²³ This is so even if the number of

¹⁸ Innst. S. No. 172 (1993–1994).

¹⁹ Doc. 16 (2011–2012) section 12.2.

²⁰ Indreberg (2015), p. 395.

²¹ HR-2016-2554-P.

²² Doc. 16 (2011–2012) section 10.3.2.

²³ Doc. 16 (2011–2012) section 10.5.2.

human rights provisions has been limited and the intensity of court control has varied. After the adoption of Article 110c in 1994, the number of cases where human rights were asserted increased,²⁴ which suggests that the decision to add a provision referring directly to human rights in the Constitution actually had an effect. With the adoption of the Human Rights Act in 1999, the number of cases involving human rights continued to increase. Since the human rights catalogue in the Constitution was limited at the time, mostly international human rights conventions were asserted.

Over time, certain guidelines have been developed for judicial review. This applies to rights laid down in the Constitution as well as in human rights conventions. To which extent the courts will review whether legislation or administrative decisions are unconstitutional may depend on the area of law and the type of right at issue. In its ruling in Rt. 1976 p. 1 (*Kløfta*), the Supreme Court divided constitutional provisions into three categories. This has later been confirmed in several plenary rulings, including Rt. 1997 p. 1821 (*Kjuus*), Rt. 2007 p. 1281 (*ground lease I*), Rt. 2010 p. 143 (*shipping tax*), Rt. 2010 p. 535 (*The Norwegian Church Endowment*)²⁵ and Rt. 2010 p. 1445 (*war crimes*). In brief, the division implies that the courts will normally not review the application by the other branches of government of constitutional provisions that regulate the relationship between them. The extent to which the courts will carry out a review when applying the human rights provisions of the Constitution to decisions by the other branches of government will also depend on the type of rights. When it comes to provisions concerning personal freedom and safety, the constitutional protection is considered to be substantial. This has manifested itself particularly in the areas of criminal law and criminal procedure.²⁶ On the other hand, provisions concerning protection of economic rights are deemed to be somewhere in the middle, as the courts to a larger extent may grant the legislature latitude of action. This implies that the courts in such cases may confer a wider margin of discretion to the legislature to determine which measures are to be deemed constitutional.²⁷

As for the courts' power to review the compatibility with international human rights conventions, the adoption of the Human Rights Act in 1999 constituted a break with the past. Earlier, the Supreme Court had held that human rights conventions, ECtHR rulings and principles of public international law apply in Norwegian law, but also held that internal norms would take precedence in cases of clear conflict.²⁸ Fortunately, the Supreme Court had almost always been able to avoid admitting that there was a clear conflict in the case at hand. As has been discussed above, the adoption of the Human Rights Act with its primacy clause in section 3 meant that the conventions incorporated therein took precedence over any conflicting

²⁴ Doc. 16 (2011–2012) section 12.2.

²⁵ An endowment with assets stemming from property held by the church prior to the Reformation. It is subject to constitutional restrictions as to its use.

²⁶ For instance, Rt. 2010 p. 1445.

²⁷ For instance, Rt. 1996 p. 1415 on the constitutional protection of social security rights.

²⁸ Rt. 1997 p. 580.

legislative provisions.²⁹ Subsequently, several provisions of acts of parliament and administrative decisions have been reviewed by the courts and, as regards legislative provisions, considered inapplicable to the case at hand, or, with regard to administrative decisions, held to be invalid.³⁰ The ECHR has had the most impact.

Guidelines for the interpretation and application of the conventions have developed through Supreme Court case law. These guidelines set certain limits for the courts' review. For instance, the Supreme Court's approach to the ECHR has been to refrain from dynamic interpretation. This implies that, if the question has not been answered in the case law of the ECtHR and it is unclear how that Court would conclude on the particular issue, Norwegian courts are not to be "pioneers" and find, with only weak support in ECtHR case law, that Norwegian legislation or administrative decisions are in conflict with the ECHR. As a rule, Norwegian courts should also not apply "safety margins" in order to avoid that Norway is held liable for breach.³¹ Norwegian courts lack the ECtHR's level of knowledge of the legislation, legal principles and case law of other European countries. Consequently, there is a risk that Norwegian courts may go further than necessary in relation to the ECHR if they were to adopt the same "dynamic" approach to the ECHR as that Court. This in turn would entail unnecessary restraints on the powers of the other branches of government. This view has been repeated in a number of Supreme Court rulings, including more recent ones.³²

4 The Lønning Commission's Report and Adoption of New Human Rights Provisions

4.1 *The Need for More Human Rights Provisions in the Constitution*

With the adoption of the 1999 Human Rights Act and its primacy clause, human rights became a more significant part of Norwegian law. A question raised in connection with the Lønning Commission's report was thus whether there was a need to add more human rights provisions to the Constitution. This question was all the

²⁹ As mentioned above, this provision is inspired by a similar provision in the EEA Act section 2 on the status of EEA law as part of Norwegian law, which in turn is based on Protocol 35 of the EEA Agreement.

³⁰ Norwegian courts do not consider themselves empowered to declare acts of parliament invalid if they are found to violate the Constitution. Instead, the act is simply not applied to the case at hand to the extent the act contains provisions that violate the Constitution. With regard to decisions of the executive branch of government, however, there is a long-standing tradition of declaring them invalid if they are found not to be in accordance with the law, including the Constitution.

³¹ Rt. 2000 p. 996.

³² For instance, Rt. 2011 p. 800 and Rt. 2013 p. 374.

more pertinent because the Commission's proposal was not supposed to lead to changes to the substantive state of the law.³³

The Commission nevertheless concluded that the Constitution should be revised so as to include more human rights provisions. An important argument in this respect was that a constitutionalisation would better safeguard against short-term shifts in political views leading to amendments of the law. As pointed out above in Sect. 2, the Human Rights Act with its primacy clause did not offer the same kind of protection against subsequent legislation violating human rights. Constitutional changes require the support of a larger majority of the Storting and take time to implement.³⁴ Hence, the constitutionalisation would contribute to more stability and predictability. It was also emphasised that a modern Constitution ought to express and safeguard the state's basic values.

However, not everyone agreed that constitutionalisation was desirable. Several critics warned that an increased constitutionalisation of human rights could weaken democracy, since it would entail genuine restraints to the will of the majority in the Storting. A constitutionalisation of more rights could be regarded as a substantial transfer of power to the courts at the expense of the legislative and executive branches of government.³⁵ In other words, the courts' traditional power of review was used as an argument against an extended human rights catalogue in the Constitution.

The Lønning Commission argued that a constitutionalisation would only involve marginal adjustments to the balance of power between popularly elected organs of state and the courts, since the courts already had the power to review whether legislation and administrative decisions violated conventions incorporated in the Human Rights Act. It was also argued that the legislature itself would bring about the limitation to its latitude of action if further human rights were included in the Constitution – the limitation would not have been forced upon it by the courts. The only practical and legal implication of the changes was that the courts would be able to review legislation and administrative decisions against the new human rights provisions in the Constitution in addition to reviewing them against those of the Human Rights Act.³⁶

The changes to the Constitution were not meant to replace legislation that incorporated human rights conventions, and the Commission made no proposal to repeal the Human Rights Act. The idea was that the new provisions in the Constitution and the human rights conventions were to exist side by side as part of Norwegian law.³⁷

³³ Doc. 16 (2011–2012) section 10.2.1.

³⁴ See the amendment provision in Article 121. According to this Article, proposals for amendments must be formally presented to the Storting at least 1 year before a parliamentary election, and amendments must be adopted during the course of the first 3 years after the election. Thus, any amendment to the Constitution can be discussed during an election campaign before it can be adopted.

³⁵ Doc. 16 (2011–2012) section 10.5.2.

³⁶ Doc. 16 (2011–2012) section 14.4.2.

³⁷ Indreberg (2015), p. 396.

4.2 *Selection of Rights*

The mandate of the Lønning Commission also requested an assessment of which “central human rights” should be made part of the Constitution. Thus, it was implicit that certain human rights were more central and universal than others, and that it was within the Commission’s mandate to make a selection. Questions were raised as to whether this was possible at all, considering the close connection between the various rights and the fact that they cannot be interpreted independently of each other.³⁸

The Lønning Commission supported the idea of a holistic approach to the interpretation of human rights, but held that this did not prevent the selection of only central rights to be included in the Constitution. The Commission also argued that this was consistent with the Norwegian tradition of the Constitution establishing only certain fundamental principles, leaving regulation in detail to other legislative instruments.³⁹ A more detailed regulation in the Constitution was also not desirable since it could obstruct the freedom of future generations. As the Commission saw it, the convention rights not included in the Commission’s proposal for new constitutional provisions could be regarded as detailed emanations of the more fundamental human rights principles.⁴⁰ In addition to specific proposals as to which human rights to include, the Lønning Commission made proposals for structural changes in the Constitution. To highlight the importance of human rights, it was proposed – and later accepted – to place the provisions in a new separate chapter on human rights.⁴¹

The proposals involved provisions on both the so-called civil and political rights and the so-called economic, social and cultural rights. The Commission assumed that these rights would strengthen each other and jointly protect the fundamental dignity of human beings in a balanced way. Still, as we shall see, the two categories of human rights were for the most part discussed separately in the Storting.⁴²

4.3 *Civil and Political Rights*

New civil and political rights that were proposed and later adopted were the right to life and prohibition against the death penalty (Article 93), the principle of equality before the law and protection against discrimination (Article 98), the right to privacy and protection of personal integrity (Article 102) and children’s rights (Article 104). In addition, new or modernised provisions were proposed and adopted regarding the

³⁸ Doc. 16 (2011–2012) section 11.2.1.

³⁹ Doc. 16 (2011–2012) section 11.4.1.

⁴⁰ Doc. 16 (2011–2012) section 11.2.2.

⁴¹ The Constitution, part E.

⁴² For instance, Doc. 12:30 (2011–2012), Doc. 12:31 (2011–2012), Innst. 186 S (2013–2014) and Innst. 187 S (2013–2014).

protection of liberty (Article 94), the right to fair trial before independent courts (Article 95), the principles of *nulla poena sine lege* and presumption of innocence until proven guilty (Article 96), the right to join associations (Article 101) and freedom of movement (Article 106). These rights were considered as fundamental in a modern state based on the rule of law, and their inclusion into the Constitution was uncontroversial.⁴³ The Commission's proposal to constitutionalise the legality principle was also adopted (Article 113). Earlier, this principle had been counted as customary constitutional law based on basic principles of division of powers.

A proposed new and extended provision on religious liberty in Article 99 did not, however, pass in the Storting. A majority held that such extension would disturb the difficult settlement from some years earlier on the separation between the state and the church. Nor the proposal to constitutionalise the right to family life was adopted. This was due to disagreement on how to understand the term "family" in a modern context.⁴⁴ The Commission's proposal to add a *ne bis in idem* prohibition was postponed. This was also the case with the proposal to include an express provision on judicial review that hitherto had rested on customary constitutional law. The latter provision was later adopted and included as Article 89.

4.4 *Economic, Social and Cultural Rights*

The Lønning Commission's proposal to include economic, social and cultural rights in the Constitution proved to be more controversial in the Storting, as these rights are of a more "political" nature.⁴⁵ They involve a distribution of and access to resources, and the state's prioritisation of certain interests over other social concerns.

The Lønning Commission argued that the view on economic, social and cultural rights had undergone a development on the international level. The Commission also pointed to the fact that the UN Covenant on Economic, Social and Cultural rights had already been incorporated into the 1999 Human Rights Act. To the extent that such rights had been asserted before the courts, this had not led to the courts in effect ordering a reallocation of resources.

Among the provisions proposed were the right to cultural identity and participation in cultural life (Article 107), the right to education (Article 109) and the right to a satisfactory standard of living and to health care (Article 111). Furthermore, it was proposed to extend Article 110 on the government's duty to create conditions under which everyone can make a living through work also to include making a living through a trade. In addition, it was proposed that this provision includes the right to social security. The Commission also proposed a new Article 112 on the right to a healthy environment, as a continuation and strengthening of the then Article 110b.

⁴³ Innst. S 186 (2013–2014).

⁴⁴ Innst. 183 S (2013–2014).

⁴⁵ Doc. 16 (2011–2012) section 11.3.3.

It was suggested that the provision on the Sami language, culture and social life was moved (from Article 110a to Article 108) and amended to reflect that the Sami are an indigenous people. Regarding the protection of children's rights, the Commission proposed a separate paragraph on the state's duty to ensure economic and social safety and health care for children.

The Commission also saw a need to clarify that most rights could be subject to certain limitations if they conflicted with other human rights or with important social concerns. As it was also desirable to determine which constitutional rights were inalienable, the Commission proposed an express provision on the possibility to limit some of the constitutional rights under certain conditions, modelled on provisions found in the ECHR and in EU/EEA law. The Commission saw it as important that the possibility of making exemptions followed directly from the Constitution, and was not left to the courts to establish in case law.

The Commission also discussed whether certain existing human rights provisions should be removed or adjusted, as some of them were deemed to be of little or no significance.⁴⁶ One of the provisions that the Commission proposed to remove was Article 101 on the right to engage in a trade. The traditional understanding of this provision was as a principle of equality between tradesmen, not as a freedom to engage in a trade.⁴⁷ In light of the Commission's proposal to include a general principle on equality before the law,⁴⁸ the old Article 101 was deemed superfluous. The Commission was also of the opinion that the prohibitions against discrimination and against monopoly and cartels in EEA law probably did more than the old Article 101 of the Constitution to ensure equal rights for tradesmen.⁴⁹

The subsequent discussions in the Storting's standing committee on constitutional affairs revealed a great deal of scepticism about adding provisions on economic, social and cultural rights to the Constitution. Some of the members of the committee found that the disadvantages of having general and vague provisions in this field were greater than in the field of fundamental civil and political rights. Although economic, social and cultural rights were already part of Norwegian law through the 1999 Human Rights Act with its primacy clause, these members feared that a constitutionalisation would be interpreted as an invitation to the courts with the Supreme Court on top to decide on the prioritisation of social interests and the allocation of public funds, rather than leaving these decisions to the Storting and the Government.⁵⁰

Certain members of the committee also argued that a constitutionalisation of human rights would lead to increased influence for international judicial organs with a more pronounced tendency to "dynamic" interpretation than national courts.⁵¹ This was a particular concern with regard to economic, social and cultural rights.

⁴⁶ Doc. 16 (2011–2012) section 1.1.

⁴⁷ Rt. 1951 p. 639, Rt. 1995 p. 1789 and Doc. 16 (2011–2012) section 38.2.4.

⁴⁸ The Constitution, Article 98.

⁴⁹ Doc. 16 (2011–2012) section 38.2.4.

⁵⁰ Innst. 187 S (2013–2014) section 2.1.

⁵¹ Innst. 187 S (2013–2014) section 2.3.

However, the majority in the Storting voted in favour of adding this type of rights to the Constitution, although not all of the Lønning Commission's proposals obtained the required majority.⁵² In the view of the majority, constitutionalisation of civil and political rights only, and not economic, cultural and social rights, might be perceived as a step backward for human rights in Norway, since the Constitution already contained some provisions in the latter category. The Commission's proposals were largely worded in a way that secured the political latitude of action, as the rights were formulated as duties incumbent upon the state rather than inalienable and directly enforceable rights for the citizens.

Of the proposals for the new provisions mentioned above, only those concerning cultural rights and the right to a satisfactory standard of living and health care did not obtain the required majority in the Storting. Nor was the proposal to change the provision on Sami language, culture and social life (Article 108) adopted. The proposals to remove superfluous provisions, however, were adopted. The standing committee on constitutional affairs postponed the deliberations on the proposal to include a general clause on the possibility to limit certain rights under certain circumstances.⁵³ Such an inclusion has later proved difficult to achieve.⁵⁴ The Constitution currently contains no consistent approach with regard to limitations to constitutional rights. The only provision reflecting such a principle is Article 100, which expressly states that the freedom of expression can be limited on certain conditions.

5 The Supreme Court's Application of the New Provisions

Several Supreme Court rulings apply or refer to the new provisions of the Constitution. The rulings address issues in a number of legal areas, such as criminal procedure, criminal law, immigration law, tax law and employment law. The provisions are mostly asserted by the parties in the same way as similar provisions of international human rights conventions. However, it is to be expected that at least some of the new constitutional provisions may raise new legal issues, also of a more national nature. One example is a case currently being heard in the lower courts where several environment organisations have united to challenge a Government decision to issue new licenses for the production of oil and gas, claiming it is contrary to the Article 112 of the Constitution on environmental protection.⁵⁵

The rulings show that the Constitution – in line with the Storting's intention – is regarded and applied as a relevant source of law on issues concerning human rights. However, the Constitution's human rights provisions have not made the corresponding international human rights conventions superfluous as part of Norwegian law.

⁵² According to the Constitution, Article 121, a 2/3 majority is required for constitutional changes.

⁵³ Doc. 12:31 (2011–2012) p. 200.

⁵⁴ Innst. 165 S (2015–2016).

⁵⁵ Oslo District Court ruling of 4 January 2018, appeal pending.

Supreme Court case law since 2014 demonstrates that the Constitution and the international human rights conventions as a rule are applied in parallel or interpreted in light of each other. The legislature's intention that the provisions of the Constitution and the conventions incorporated into the Human Rights Act were to exist side by side seems to have been fulfilled.

Due to the substantial work carried out prior to the 2014 revision, comprehensive and easily accessible preparatory works for the new constitutional provisions exist. These works give a useful explanation for the choice of words and the purpose of the individual provisions, as well as the constitutional reform in general. From a Norwegian constitutional perspective, this is unique. To the extent the preparatory works reflect the Storting's intention when adopting the changes, it follows from a number of Supreme Court rulings that this is relevant and will be attributed much weight in the courts' subsequent application of the various provisions.⁵⁶ If the legislature has expressly defined the scope of a certain right through statements in the preparatory works, it is unlikely that the Supreme Court will challenge this view.⁵⁷

Nevertheless, in some cases the Supreme Court's contribution to development of the law has been called for. The preparatory works of the 2014 revision state clearly that the safeguarding of the individual human rights was not meant to be absolute. The proposal to include a general limitation provision illustrated a need for flexibility, inter alia out of concern for other human rights provisions and important social interests.⁵⁸ Although a general limitation clause was not adopted, the Storting later appeared to agree that it would be appropriate. In the absence of a general limitation clause, or guidelines from the legislature on which limitations must be accepted in relation to individual provisions, the Supreme Court has been compelled to develop guidelines for the possibility to limit the rights. Already in its ruling in Rt. 2014 p. 1105, the Supreme Court held that limitations of constitutional rights, in order to be acceptable, should as a minimum be in accordance with the law, pursue a legitimate purpose and be proportionate. Furthermore, it has been held that the proportionality assessment must focus on the balance between the protected individual rights, on the one hand, and the legitimate social concerns justifying the measure, on the other. These criteria are well known from, inter alia, the ECHR. The Supreme Court has continued this line of reasoning in several other cases, in effect introducing through case law a limitation clause of the kind that the Storting hitherto has failed to enact.⁵⁹ In this way, the Supreme Court has accepted a latitude of action for the other branches of government that the Storting no doubt wanted to retain, in spite of its failure to include a limitation clause in the Constitution.

⁵⁶ For instance, Rt. 2014 p. 1292, Rt. 2015 p. 93, Rt. 2015 p. 334 and Rt. 2015 p. 921.

⁵⁷ For instance, that Article 98 on equality before the law only protects natural persons, cf. Doc. 16 (2011–2012) section 26.6.2.3.

⁵⁸ Bårdsen A, *Grunnloven, overvåking og domstolenes rolle* (The Constitution, surveillance and the role of courts), lecture held at the Bar Association's Human Rights Summit 21 April 2017, published on the Supreme Court's website.

⁵⁹ For instance, Rt-2015-93 (*Kenya*), Rt-2015-155 (*Rwanda*) and HR-2016-2554-P (*Holship*, which, on this point, was unanimous).

Another provision that has raised a question of interpretation is Article 92. This provision corresponds to the former Article 110c, laying down a duty for the state to respect and secure human rights, but also stating that the incorporation of international human rights instruments into national law shall follow from further acts of parliament, see Sect. 2 above. In 2014, the provision was moved to Article 92, and the wording was changed. In particular, the provision regarding incorporation through acts of parliament was removed. This, combined with some statements by the Storting's standing committee on constitutional affairs regarding the understanding of the provision, suggested that the committee had intended the provision to mean that all human rights conventions to which Norway was a party now ranked as Norwegian internal law on par with the Constitution itself. However, that would have entailed such a dramatic constitutional reform that one would have expected the committee to have signalled it more clearly if that indeed was the intention. In addition, such a reform would have made many of the new human rights provisions, adopted at the same time, superfluous. In its plenary judgment in the *Holship* case, which will be discussed in more detail in Sect. 6, a unanimous Supreme Court concluded that Article 92 could not be interpreted in this manner. The provision had to be interpreted only as a directive to the courts and other authorities to apply and enforce human rights at the level at which they have been incorporated into Norwegian law.⁶⁰ This was, in fact, the traditional interpretation of Article 110c.

Since the new constitutional rights are based on provisions laid down in various conventions, the Supreme Court has also assumed that they are to be interpreted in light of those conventions. This means, *inter alia*, that the practice of the various international bodies charged with the interpretation of those conventions is relevant also when interpreting the constitutional provisions. Yet, it follows from the Supreme Court ruling in Rt. 2015 p. 93 that the precedent value of the case law of international bodies will depend on whether the case law is from the period before or after the constitutional changes. When the Storting adopted the new constitutional provisions in 2014, this was conditional upon the new provisions being interpreted "in accordance with" international conventions. However, the Storting cannot be deemed to have bound the interpretation of the Constitution to any future legal development of the law by international bodies. As already mentioned, such bodies have demonstrated a greater tendency to dynamic interpretation of human rights than the Supreme Court. Thus, future case law from international bodies will not have the same relevance for the interpretation of the Constitution as for the interpretation of corresponding international provisions. Nevertheless, also future international case law could have a certain impact on the interpretation of the Constitution.

The review of Supreme Court case law after the 2014 revision also shows that the Supreme Court refers to constitutional provisions in far more rulings than before. However, this does not imply that more cases are currently *decided* on the basis of these provisions. The revision of the Constitution had the effect of changing the set of sources of law applicable to the case at hand. If the Supreme Court is to give a complete picture of those sources, it must also refer to the relevant provisions of the

⁶⁰ HR-2016-2554-P (*Holship*) paragraphs 70 and 140.

Constitution. This applies even if the specific matter is decided based on more detailed provisions found in regular legislation, or if the human rights in question can also be derived from international conventions. When more detailed regulations apply to the question at hand, case law shows that the relevant constitutional provision is normally not crucial for the outcome. The constitutional provision is often mentioned without its actual contents being discussed. However, in certain cases, the Constitution plays a more prominent part in the court's reasoning to ensure that the legislation in question is not interpreted in conflict with any of the newly adopted constitutional provisions.

The Storting is the organ of state empowered to amend the Constitution. Any reluctance by the Supreme Court to apply the new human rights provisions whenever relevant in its rulings would display a lack of respect towards the Storting. There is no basis for claiming that the Supreme Court, through its application of the new provisions, has demonstrated an increased will to exercise judicial control with ordinary legislative processes and administrative decisions.

6 EEA Law and Fundamental Rights: A Multi-Level Problem

In a plenary judgment of 16 December 2016,⁶¹ the Supreme Court had to deal with the interface between EEA law on free movement and fundamental rights. This issue came up not only as a matter of internal EEA law, but also as a possible conflict between EEA law, on the one hand, and international human rights instruments and the Norwegian Constitution, in particular the new Article 101 on freedom of association, on the other.

Under the Norwegian Boycott Act,⁶² an action may be brought before the courts to determine in advance whether a boycott is lawful or not. This depends, *inter alia*, on whether the boycott has a lawful purpose.

In 2013, the Norwegian Transport Workers Union ("NTF") brought such an action in preparation of a boycott to force the undertaking Holship Norge AS ("Holship") into a tariff agreement termed "the Framework Agreement". This would have required Holship to use the services of a legal entity called "the Administration Office" for loading and unloading services in the port of Drammen, a town outside of Oslo. Holship, which is a wholly owned subsidiary of a Danish company, had intended to use its own workers.

According to the tariff agreement, loading and unloading by others may only take place if the Administration Office declines to do the work. This priority clause

⁶¹ Case HR-2016-2554-P (*Holship*), available at <https://www.domstol.no/globalassets/upload/hret/avgjorelser/2016/avgjorelser-desember-2016/sak-2014-2089-plenum.pdf>. An English translation may be found at <https://www.domstol.no/globalassets/upload/hret/decisions-in-english-translation/case-2014-2089.pdf>.

⁶² Act of 5 December 1947 No 1.

forms part of Norway's fulfilment of ILO Convention No. 137 Concerning the Social Repercussions of New Methods of Cargo Handling in Docks. According to Article 3, the parties to the Convention shall maintain registers for dockworkers, and registered dockworkers shall have priority of engagement for dock work. The dockworkers of the Administration Office, which is a non-profit entity with the sole task of administering loading and unloading at the port, are all registered.

The question of lawfulness initially turned on whether the Framework Agreement had immunity from competition law. An exemption from competition law for collective agreement is recognised under EU/EEA law as well as under Norwegian law. However, its exact scope may not be clear in all cases. Before the Court of Appeal, *Holship* had also argued that the boycott would be unlawful as an unjustified restriction on its freedom of establishment under EEA law, but the Court of Appeal did not accept this.

Holship appealed to the Supreme Court, which accepted to hear the appeal. The Supreme Court submitted several questions to the EFTA Court concerning both competition law and the freedom of establishment. The EFTA Court's answers are found in its judgment of 19 April 2016 in *Holship Norge AS v. Norsk Transportarbeiderforbund*.⁶³

For reasons having to do with the procedure before the Supreme Court, the Supreme Court from then on mainly dealt with the case from the point of view of freedom of establishment. Thus we will leave the competition law aspects of the case aside for the purposes of this article.

In its answers to the Supreme Court, the EFTA Court in essence said that protection of workers and the right to take industrial action have their limits as legitimate aims that may justify restrictions on free movement. They do not go as far as including the objective of securing the continued existence of the workers' own jobs against competition from other undertakings – provided of course that those other undertakings have a sufficient link to another EEA State.⁶⁴

In its written arguments to the Supreme Court subsequent to the EFTA Court's judgment, NTF argued that if the priority right of Administration Office dockworkers and the boycott to enforce it against *Holship* was contrary to EEA law, EEA law on this point violated Article 101 of the Norwegian Constitution as well Article 11 ECHR on freedom of association.⁶⁵ NTF further submitted that this would also violate the revised European Social Charter and several ILO Conventions – not only No. 137, but also No. 87 Concerning Freedom to Associate and Protection of the Right to Organise and No. 98 Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively.

The state, acting as a kind of *amicus curiae*,⁶⁶ made the argument that, since fundamental rights are also part of EEA law, it must be possible, as a matter of EEA

⁶³ Case E-14/15, *Holship Norge AS v Norsk Transportarbeiderforbund*, nyr.

⁶⁴ Paragraphs 122–127 of the judgment.

⁶⁵ NTF had other arguments against the EFTA Court's opinion. The discussion of those falls outside the scope of this article.

⁶⁶ According to Section 30–13 of the Civil Procedure Act, the state, if not a party to the proceed-

law, to strike a fair balance between the right to free movement and fundamental rights. This would avoid a confrontation between EEA law, on the one hand, and international human rights instruments and the Norwegian Constitution, on the other.

This introduced fundamental rights into the case at three levels: as a part of EEA law that the EFTA Court had failed – as it were – to consider properly; as part of Norway's international obligations other than the EEA Agreement; and at the level of the Norwegian Constitution itself. Even if, according to Protocol 35 of the EEA Agreement, national rules implementing EEA law must prevail as a matter of EEA law, it is not given that this would actually be the result in all cases under national law. With regard to the Constitution itself, it would certainly not be the result.⁶⁷

The Supreme Court split 10-7 on whether the EFTA Court's opinion really meant that the aim of the priority right of the dockworkers of the Administration Office and the boycott to enforce it was illegitimate. We will not go further into the arguments of the majority and the minority on this point, other than mentioning that the disagreement was one of whether the EFTA Court's answers were based on a misunderstanding of the facts of the case. The majority, to which both authors of this article belong, found that there was no misunderstanding and that the aim indeed was illegitimate. Thus, only the majority had to deal with the counterarguments based on fundamental rights.

The majority took as its starting point that both Article 101 of the Norwegian Constitution and Article 11 ECHR on freedom of association allowed for restrictions prescribed by law and necessary in a democratic society.⁶⁸ It also found that the revised European Social Charter and ILO Conventions No. 87 and No. 98 cannot be understood to grant to trade unions an unrestricted right to use boycott as a means of collective action. These instruments must be interpreted to allow for the same kind of legitimate restrictions in this regard as does Article 11 ECHR.

Having been incorporated into Norwegian law by an act of parliament, the provisions of the EEA Agreement on free movement are prescribed by law. They serve to protect the rights and freedom of others, in this case the freedom of establishment for Holship. Thus, it would come down to a proportionality test whether the view that EEA law did not allow measures intended to shield workplaces from redundancy by denying a competitor market access, could be allowed to prevail over the constitutional protection of freedom of association.⁶⁹

ings, may submit arguments before the Supreme Court in cases that raise the question of whether acts of parliament or provisional ordinances are in conflict with the Constitution or international obligations, but only in so far as it is necessary to safeguard the state's interests in case of a conflict.

⁶⁷ Protocol 35 EEA does not deal with the conflict between national law implementing the EEA Agreement and provisions of national constitutions.

⁶⁸ Paragraphs 80–81 of the judgment. In what was for the minority an *obiter*, it agreed with the majority that Article 101 must be understood to allow for such restrictions, see paragraph 140 of the judgment.

⁶⁹ Paragraph 84 of the judgment.

With regard to the proportionality test itself, the majority made the pragmatic observation that the assumption must be that the Court of Justice of the European Union, the EFTA Court, the ECtHR and the Norwegian Supreme Court would come to the same conclusions. Although with different starting points in EU/EEA law, ECHR or Norwegian law, one could not exclude that their conclusions would be different, there was no indication at present as to where such differences would lie.⁷⁰

This simplified the potential multitude of proportionality tests to, at least for the purposes of this case, one common test that the majority carried out within the framework of EEA law.

In conducting this proportionality test, the starting point for the majority was the view of the EFTA Court on the non-legitimacy of the aim to protect the workplaces in one undertaking from redundancy as a result of competition from another undertaking. Thus, the proportionality test would not be the usual one asking whether a legitimate aim could be achieved by less restrictive means.⁷¹ It was rather whether the conclusion that the aim was illegitimate would have to be abandoned, as a matter of EEA law, in light of EEA fundamental rights. This meant balancing one set of values, free movement, against another set of values, freedom of association.

The majority of the Supreme Court came to the conclusion that freedom of association as a fundamental right did not require the boycott to be considered as based on a legitimate objective for restricting freedom of establishment. It observed that from a human rights perspective, it is hard to argue that the jobs at *Holship* are less valuable than the jobs at the Administration Office.⁷²

This left the question of compatibility with ILO Convention No 137 and its requirement of priority for registered dockworkers. The priority clause could hardly qualify as a fundamental right under EEA law or, for that matter, constitutional law. As the EEA principles on freedom of establishment had the status of an act of parliament, while the ILO Convention had not, it followed from the primacy clause of section 2 of the EEA Act that the principle of freedom of establishment must prevail. This was also the approach of the EFTA Court, in pointing to Protocol 35 of the EEA Agreement. However, the majority did suggest that it was not obvious that priority for dockworkers employed by a special Administration Office was the only way of fulfilling the Convention.

The *Holship* case demonstrates that the new provisions on human rights introduced into the Norwegian Constitution have had an impact on the interface between EEA law and national law. This time, the Supreme Court found a way of simplifying its treatment of the various fundamental rights involved. It may be more complicated next time.

⁷⁰ Paragraph 86 of the judgment.

⁷¹ As examples of fundamental rights as legitimate grounds for restricting free movement and then being subjected, in reality, to a necessity test, see Case C-112/00, *Schmidberger*, EU:C:2003:333, at paragraphs 78–93 and Case C-438/05, *Viking Line*, EU:C:2007:772, at paragraphs 75–82 and 89.

⁷² Paragraph 118 of the judgment.

7 Concluding Remarks

The introduction of an extended and modernised human rights catalogue into the Norwegian Constitution in 2014 has presented Norwegian courts with new challenges. However, as most of the new provisions are based on international models, not least the ECHR, the potential for a dramatic shift in the legal landscape is limited. These provisions have in fact been in use for decades by Norwegian courts, and many of them come with an extended case law attached through the decisions of the ECtHR and other international bodies. Fundamental rights as part of EEA law have also limited the potential for conflict between the new constitutional provisions and EEA law.

The 2014 reform is a clear demonstration of how international human rights law interacts with national constitutional law, with national constitutional law benefiting from the result.

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A Different Level, a Different Purpose? Reflections on International Criminal Law from the Perspective of Penal Theory



Jean-Luc Baechler, assisted by Gian-Flurin Steinegger

1 Prolegomenon

Twenty-two years after the Srebrenica genocide, the worst war crime post World War II,¹ the former Serbian general Ratko Mladić was sentenced to life imprisonment on 22 November 2017 by the International Criminal Tribunal for the former Yugoslavia (“ICTY”) in The Hague. Shortly before it closed as an institution, the Tribunal thus once again attracted attention with its high-profile conviction. The reaction was considerable. Although there was satisfaction at Mladić’s sentence in many quarters, the judgment unsurprisingly met with rejection in the Balkans, for example in parts of Serbia where Mladić is sometimes still being celebrated as a war hero. By imposing the penalty of life imprisonment, the Tribunal had opted for the most severe of all the penal sanctions available to it.

Impulsively one has to agree with all those who, from an instinctive moral sense of justice, support a punitive sanction of this kind, yet it seems inconceivable to allow atrocities like those committed by Mladić to go unpunished. But what is the answer to all those who consider the life sentence imposed on him to be inadequate given his crimes? It is certainly possible to question the life sentence – which Mladić will probably not have to serve (in full) because of his age – as an appropriate response to his crimes. And certainly, there are voices calling for the death penalty for him. But, as others will ask, does such a penalty really give subsequent satisfaction for the parties injured by his crimes?

President of the Federal Administrative Court of Switzerland, and Court Clerk, Federal Administrative Court of Switzerland, respectively.
Translated from German by Harvey Jessop.

¹In general, Rohde (1997).

J.-L. Baechler (✉) · G.-F. Steinegger
Federal Administrative Court, St. Gallen, Switzerland

These doubts, while expressed somewhat *ad hoc*, are intended to prepare the ground for probably the most fundamental jurisprudential question in the criminal law sciences (at least a more fundamental question is difficult to imagine), namely the question of the intent and purpose of punishment. Whilst in national criminal law the debate over the purpose of punishment is caught in a kind of constant immutable cycle – one can read of “tiresome trench warfare”² – it is being rekindled at different levels by the international criminal courts. The discussion is being ignited above all by the enormous scale of international crimes, or core crimes, in particular the offences of genocide, crimes against humanity, war crimes and aggression listed in the Rome Statute for the first time using this terminology (although the categories date back to the Nuremberg Trials), which take the application of criminal law to its breaking point and even make the criminal law in force seem virtually ineffectual. Suppositions of this nature weighed on the philosopher and political theorist Hannah Arendt when, in her correspondence with Karl Jaspers, she stated that the National Socialist crimes “explode the limits of the law” and that “no punishment is severe enough” for such crimes.³

Arendt’s concerns that these crimes were outside the limits of criminal law certainly did not deter humanity from attempting to respond to crimes of this nature with the instrument of criminal law. The starting point was the Nazi genocide in Germany to which Arendt referred. At the famed Nuremberg Trials the principal war criminals of the Second World War were brought to trial by the victorious Allied powers. Nuremberg has since served as code for a new premise for criminal law activity, a premise that takes account of the fact that states themselves can be involved in crimes, the criminal punishment of which can no longer be blocked under the guise of state sovereignty. These efforts reached a temporary peak with the establishment of the International Criminal Court (“ICC”). Despite the skepticism expressed by Arendt, efforts toward a criminal punishment of modern mass crimes have thus intensified since Nuremberg. Yet this should not hide the fact that doubts and difficulties have remained over the criminal punishment of this form of criminality.

Although the punishment of macro-criminality in international law has for some time been associated with the paradigm of reactionism, with the establishment of the permanent International Criminal Court a point appears to have been reached where reactionism must give way to a nuanced and perhaps more critical institutional orientation. After the euphoria of its establishment, it seems to have entered the consolidation phase, where the work of an institution that is no longer limited in time and space only to conflict areas is finding its place, and the question of the purpose of punishment must be pushed further to the fore.

In this article, however, we will begin by leaving behind the level of international criminal law and take a cursory look at least at the jurisprudential discourse regarding the purpose of punishment which, given the still young history of international criminal law, has regard above all to local criminal law. The well-known dualism of

²Hassemer (2008), p. 10.

³Köhler and Saner (1985), p. 90.

relative and absolute theories enables a systematisation of the argumentation, even though it is recognised that this conceals important distinctions and that this dualism would even appear to be responsible for a certain “intellectual inflexibility”⁴ in the discussion of the purpose of punishment.

2 The Foundations of Penal Theory

2.1 *Relative Penal Theories: Primacy of Utility*

Relative penal theories are oriented towards the consequences or the utility of punishment, but formulate the intended purpose of punishment differently. A preventive penal theory must be able to give reliable answers to the question of how it seeks to justify the broad and loose concept of utility through punishment. In the current discussion on the purpose of punishment in textbooks and review articles, utility in preventive penal theories is described under the notions of general and special prevention. Within each of these main categories a distinction is drawn between a positive and a negative form. The purpose of the positive form within special prevention is the reformation of the offender, while within general prevention it is a normative effect on an indefinite group of people. The negative form in special prevention aims to create a deterrent effect on individual offenders and, as the case may be, to “incapacitate” them. The negative form in general prevention aims to create a deterrent effect on an indefinite group in the general public. It is this forward-looking approach that represents both the great opportunity and the potential downfall of preventive theories. Preventive penal theories are forever caught between maximising utility and the inevitably precarious status of forecasts, as the punishment can only be endorsed from the perspective of prevention if it can be ensured that the punishment offers the appropriate utility or that the desired future effect of the punishment can actually be realised. Preventive aims of punishment therefore require limits in order to counter the tendency towards boundless application that is inherent in such theories. The utility of punishment should not justify either the death penalty or punishment of the innocent. This highlights the roots of preventive theories in utilitarianism, i.e., preventive penal theories are subject to the same objections as utilitarian theories.⁵ Accordingly, prevention itself cannot be understood as the fundamental principle that should merely be defended against its negative tendency towards excess. In addition, it must be ensured that the preventive utility of punishment does not degenerate into an element to which everything else is simply subordinate. Considerations of utility must take account of arguments of integrity of actions and any overriding good reasons and must not obscure the fact that there are also other reasonable ways of dealing with delinquency in addition to punishment.

⁴Sachs (2015), p. 35.

⁵Zürcher (2014), p. 36.

2.2 *Absolute Penal Theories: Primacy of Justice*

Absolute penal theories are the main opposition to prevention theories. They use the traditional objections to their rival to their advantage. The theory model is motivated by the conviction of its proponents that punishment may never exploit people for preventive purposes and any penalty must therefore be based solely on the offence committed and the punishment must find its non-negotiable limit in the guilt of the offender. In light of this fundamental principle, a variety of forms have been developed within the absolute penal theories. A prominent one is retribution, although the term is loaded; it is readily equated with the archaic principle of revenge, which was heavily influenced by the law of talion. In retribution, it is possible to identify the opportunities and difficulties which also apply to other approaches developed under this paradigm within the absolute penal theories. The main difficulty with any retribution theory is, on the one hand, how to determine the degree of guilt and, on the other, how to reflect that degree of guilt in a penal sanction. Kant, for example, considered the retribution principle to be correctly transposed only in the material talion, which demands like for like following the dictum of “an eye for an eye, a tooth for a tooth.” The understandable criticism raised against the material talion paved the way for the idea of the formal talion, which does not require like for like, but equivalence of offence/guilt and punishment. This idea thus departed from the purely symmetrical thinking of the material talion, but at the same time “opened the door to innumerable pragmatic goals.”⁶ A shared characteristic of all retributive theories is that the transposition of offence/guilt into punishment – the question of proportionality – is always subject to a degree of arbitrariness. Consequently, there is no normatively binding basis on which a kind of “scale of punishment”⁷ can be devised. Because they are reliant on a punitive measure to be effective, retributive theories are open to the accusation of legalism and thus the substantive arbitrariness of that punitive measure.⁸

In addition to retribution, other variants have developed within the absolute penal theories, prominent among which are, for example, “benefit/burden approaches.” According to these theories, the members of a society must accept being subject to the law and thus to certain restrictions. In return, they benefit from legal certainty. Anyone who unilaterally breaks the law obtains an unfair benefit compared with all other members. Punishment is thus given the purpose of equalising that unlawfully obtained benefit. Other forms derive the need for punishment from human feelings such as consternation or anger and take them as the basis for the need for a sanction. Whether it is the unlawful benefit or human emotions, these forms of absolute theories likewise cannot avoid the abovementioned difficulties of retribution.⁹ It should be noted that ‘combined’ or ‘mixed’ theories are also not immune to these objections,

⁶Zürcher (2014), p. 63.

⁷Sachs (2015), p. 259; the author refers there to Antony Duff’s ideas.

⁸Zürcher (2014), p. 64.

⁹Sachs (2015), p. 38 f.

“as, depending on the weighting of their elements, they inherit the faults, as it were.”¹⁰

3 The Different Level

The fact that international criminal law did not take its major developmental steps until the twentieth century has nothing to do with the fact that crimes that would, from today’s perspective, be classified as genocide or war crimes would seem to be a twentieth century phenomenon. There is evidence of genocides back into antiquity (an example would be the complete destruction of the city of Carthage by the Romans in 146 BC during the Punic Wars).¹¹ Although there were no punitive consequences for the perpetrators of such events, as is shown by a look at history, people have always made efforts to establish the legal or political responsibility of rulers and leaders.¹² However, acceptance of the idea of individual criminal responsibility of rulers took hold seriously only as a result of the previously unimaginable scale of the First World War.

3.1 *The Development of International Criminal Law*

The Leipzig Trials after the First World War are regarded as a precursor, but not a model¹³ – especially as there was no effective criminal prosecution of punishable acts – for the development of international criminal law, which did not take on real substance until later in the twentieth century. On the other hand, the well-known Nuremberg and Tokyo Trials following the Second World War, in response to the crimes committed at that time, are regarded as a milestone in the history of international criminal law.¹⁴ International criminal courts in their present form have their roots in Nuremberg. Despite these developments, the aim of a peaceful world was not achieved. The Cold War in particular hampered efforts to develop international criminal law further. It was the two ad hoc tribunals convened by the UN Security Council on the basis of Chapter VII of the UN Charter in response to human rights violations in Rwanda and in the former Yugoslavia that became the model for an international criminal court.¹⁵ With the establishment of a permanent and territorially unbound international criminal court, a long-awaited goal, which setbacks had once made seem a remote possibility, finally became reality in a surprisingly short

¹⁰Zürcher (2014), p. 82.

¹¹Neubacher (2005), p. 257.

¹²*Ibid.*, p. 256.

¹³Mahlmann (2015), p. 136.

¹⁴*Ibid.*, p. 137.

¹⁵Reese (2006), p. 71.

time. It represented an important instrument for the respect and enforcement of human rights. There was therefore great enthusiasm and high expectations for the International Criminal Court which began its work on 11 March 2003 following the ratification of the Rome Statute of 17 July 1998.

3.2 Problems with Imputing Individual Criminal Responsibility in Macro-Criminality

Little attention has been paid thus far in criminology to the subject of international criminal law. There are various reasons for this ‘scientific neglect’; one obstacle is undoubtedly a dogmatism in criminal law accustomed to times of peace.¹⁶ If we look at the conviction of Mladić mentioned in the introduction, it is easy to see that international criminal courts focus on different types of offenders than those familiar in national criminal law: the “principal offenders,” i.e., the senior military or political leaders. The well-known theory of the abnormal psychology of such offenders has not been confirmed by criminological research.¹⁷ In any case, it contradicts the fact that such principal offenders have often lived as socially adjusted individuals and that influential positions of political or military leadership can only be secured on the condition of high general acceptance. Hannah Arendt gave a telling assessment, seeing the “banality of evil” embodied in Adolf Eichmann. It is not unreasonable, however, to focus on principal offenders. Macro-criminal delinquency takes collective form, which generally means a larger number of participants, but also makes the imputation of individual criminal responsibility a greater challenge. Macro-criminality engenders not only different offenders from national criminal law, but also different victims, who are often faced with an autocratic, corrupt, unconstitutional state. Because of their particularly defenceless and intense position, the prejudice is thus extremely serious.¹⁸ As great as the desire for the oft-quoted “end of impunity” may be, (legal) reality has long shown that in the process of social upheaval after a violent past, transitioning to democratic structures, criminal law can be just one of many responses.

3.3 “Transitional Justice”

The responses developed as alternatives to criminal law have been elevated to a separate field of research under the functional term “transitional justice.” This typically encompasses the following forms of response: prosecution on the basis of

¹⁶Neubacher (2006), p. 22 et seq.

¹⁷For example, the reports of prison psychiatrist Douglas M. Kelly at the Nuremberg trials, in: El-Hai (2013).

¹⁸Neubacher (2006), p. 25 et seq.

national or international law and with national, international or even hybrid courts, amnesties or non-prosecution, truth commissions, and forms of material reparation for victims.¹⁹ The choice of the most appropriate response can depend on a number of factors. Certainly, the seriousness of the wrong committed plays a crucial role with regard to the prosecution option.²⁰ Often, however, it is only by waiving prosecution that a peaceful transition process is made possible, a scenario debated under the heading “peace vs. justice.”

4 What Remains of the Purposes of Punishment

After the brief critical evaluation of the jurisprudential discussion of the purpose of punishment and the cursory overview of the particular features at the level of international criminal law, the absolute and relative penal theories will now be examined to ascertain whether they are suitable for international criminal law. The international criminal courts themselves also refer in their judgments almost exclusively to the traditional purposes of punishment familiar from national criminal law.²¹

4.1 *Absolute Penal Theories with Regard to International Core Crimes*

4.1.1 The Question of Measurement of Guilt

The discussion of absolute penal theories at the level of international criminal law will show that the abovementioned difficulties which are claimed to affect such theories are even more pronounced in the context of international criminal law. First, it is much more difficult to impute individual guilt in view of the special nature of international criminal offences – above all because they are committed collectively – than in national criminal law. In particular, the degree of wrong perpetrated says little about the degree of guilt of individual offenders, i.e., about their contribution to the collective act.²² The logic of crimes being equalised in retributive theories is already familiar: justice. The difficulties in retributive theories when faced with international core crimes begin even before the actual imposition of penalties. A criminal justice system which is highly selective and finds it difficult to resist political expediency in its member states cannot meet such requirements. Just as in the local criminal justice system, an international criminal court also has the difficult task of measuring the degree of guilt and reflecting it in a proportionate

¹⁹ Werle (2012), p. 105 et seq.

²⁰ Werle (2001), p. 282.

²¹ Inter alia, ICTY, Dražen Erdemović, (Sentencing Judgment), 1996, IT-96-22-T, paragraph 58.

²² Neubacher (2008), p. 119.

punishment. Here too, there is no Archimedean point. Arbitrariness in assessing guilt/punishment or sanctions can be seen in the fact that local criminal justice systems and international criminal courts employ similar catalogues of sanctions and, with similar punishments for sometimes completely different offences, arrive at something that has very little to do with the primacy of justice. In other words, it is doubtful that international criminal courts can impose penal sanctions under the paradigm of retribution with regard to justice which, on the one hand, are commensurate with the dimensions of international criminal delinquency and are not inherently characterised by disproportionality to the catalogues of sanctions of national criminal courts and, on the other, still represent humane criminal law. This holds true in particular for zero tolerance of violence which is essential for a society beset by international criminal delinquency.²³

4.1.2 Benefit/Burden Approaches

Other forms of absolute penal theories also face difficulties. For example, the “benefit/burden approaches” prove to be less than ideal in being applied in international criminal law. It is in any case terminologically dubious whether a genocide, for example, can be regarded as an unfair benefit.²⁴ Above all, however, in social structures which make such delinquency possible, this unlawfully obtained benefit would not be perceived as an unlawfully obtained benefit (and thus as a deviation from a norm), but as conforming to a norm.²⁵ There is no intact body which could allow a fair review of those benefits and burdens,²⁶ i.e., no (at least minimal) consensus on legal and moral values on which any absolute penal theory is based. There is no such basis in connection with macro-criminal delinquency. “Where no civil law is,” as Hobbes put it succinctly, “there is no crime.”²⁷

4.2 Preventive Penal Theories with Regard to International Core Crimes

4.2.1 Positive and Negative General Prevention

It is evident that international criminal delinquency occurs throughout the world. The establishment of the ICC was linked to the hope that international penal sanctions would have a deterrent effect, but forecasts are also difficult to make at this level and, given the young history of the ICC, there are not yet really any empirical

²³ Möller (2003), p. 453.

²⁴ Sloane (2007), p. 80.

²⁵ *Ibid.*, p. 81.

²⁶ *Ibid.*, p. 81.

²⁷ *Hobbes*, cited by *ibid.*

reviews of their impact. Certainly, however, insights from criminology, according to which the deterrent effect on offenders does not depend significantly on the level of the penal sanction per se, but mainly on the likelihood of their conviction, and in particular the likelihood of their arrest and sentencing and the execution of the judgment,²⁸ militate against such an effect because of the great selectivity in prosecution, although the focus is on types of offender who, on account of their political or military career, should actually be accustomed to weighing benefits and burdens, and it could thus be conjectured that such types of offender should be amenable to deterrent effects.²⁹ The vulnerability of the negative general preventive impact of penal sanctions imposed by international criminal courts can also be seen in the wishes to withdraw from the Rome Statute because of the threat of criminal prosecution. This option to withdraw – even though it cannot be accomplished overnight – is clearly detrimental to the deterrent effect of international penal sanctions. The conditions for positive general prevention, on the other hand, appear to be good, especially since (in view of the abovementioned difficulties) it does not require any empirical evidence of its deterrent effect. However, this can only counter, by means of punishment, the norm erosion that already exists in any case. Where no norms exist, their stabilisation is futile. The idea of minimal basic rules on human rights is far from being a reality everywhere in the world. Consequently, if it is a matter of first raising awareness, punishment (alone) is insufficient.³⁰

4.2.2 Positive and Negative Special Prevention

Because of the often considerable time between an offence being committed and the trial, negative special preventive purposes of punishment in the sense of “incapacitation” tend to be found, if anywhere, in pre-trial detention. Negative special preventive purposes of punishment in the sense of deterring offenders from (re-)committing crimes, by sending a warning, are also implausible, especially since the macro-criminal system of injustice that was a precondition for their offences may have long since collapsed by the time they are convicted.³¹ A positive special preventive effect of punishment, in the sense of rehabilitation for example, i.e., preparing offenders for a law-abiding life after they have served their sentence, in turn requires a socialisation deficit in the first place, which also cannot be assumed in light of the statements made above regarding types of offender.

It must therefore be stated that each of the two basic positions presented – the absolute and relative/preventive penal theories – has shortcomings which are exacerbated even further when compared with national criminal law. For some time the debate in penal theory has found fresh inspiration in expressive penal theories, which place greater focus on the communicative element of the punishment.

²⁸ Möller (2003), p. 496.

²⁹ *Ibid.*

³⁰ Jäger (1995), p. 342.

³¹ Möller (2003), p. 466.

5 Punishment and Communication

5.1 *The Case of Slobodan Praljak*

Grotesque scenes unfolded in the court room at the final pronouncement of judgment by ICTY on 29 November 2017. After the Tribunal had confirmed the 20-year prison sentence against Slobodan Praljak for the numerous war crimes with which he had been charged, he threw his head back and, with the words “Slobodan Praljak is not a war criminal, I reject your judgment,” drank from a small bottle of poison, which subsequently led to his death.³² Praljak’s suicide is undoubtedly sad and tragic. However, by taking his own life publicly, he is regarded in parts of his home country not so much as a war criminal but as a martyr who was able to avoid serving a sentence imposed by a court which he firmly rejected only by opting to kill himself. The Croatian President Kolinda Grabar-Kitarović promptly acknowledged Praljak publicly as a “man who preferred to take his own life rather than live as a convict for acts he strongly believed he did not commit.”³³ Following Praljak’s suicide, questions regarding the purpose of punishment took a back seat in his case. Praljak no longer constitutes a danger and his death makes it impossible for him to participate in (international criminal) delinquency again. Nevertheless, questions remain as to his guilt and just punishment. Above all, the feeling remains that someone has quite simply evaded their responsibility.

5.2 *Punishment as a Communicative Act*

This feeling is rooted in particular in the fact that punishment is not only the cool calculation of purposes, but also – or even primarily – a communicative act between the relevant actors (perpetrators, victims, judges etc.) in the community to which those actors belong or which they represent. It is thus a dialogue in which the perpetrator is to be made aware of the reprehensible nature of his acts. Accordingly – and this is probably the reason for the unease – Praljak not only evaded the penal sanction itself, but also that dialogue, and thus the opportunity to deal (further) with him and his actions.

This probably underestimated communicative element of punishment, this point of view that the imposition of punishment can also be construed as a communicative act, a dialogue, between various actors has been taken up profitably by the “expressive” penal theories.³⁴ All such forms of theory agree in subdividing punishment, which is generally understood by the common penal theories as a single entity, into “condemnation,” i.e., the conviction of the offender itself, and “hard treatment,” i.e.,

³² Spiegel Online (2017).

³³ *Ibid.*

³⁴ Hörnle (2011), p. 29 et seq.

the actual penal sanction possibly linked to the conviction. “Condemnation” under these expressive penal theories is the expression of the censuring of the offender; “hard treatment,” on the other hand, is rooted in the fact that reprobation only laid down in words cannot express the necessary nuances of the censure.³⁵ You quickly notice that such theory models are dependent on a number of conditions. Censuring offenders means addressing them as members of a moral community, measuring their conduct by those standards and demanding compliance.³⁶ Accordingly, members of such a moral community must be described as people who are able to understand and respond to such a censure – that is, as “moral actors”³⁷ who cannot distance themselves from their free will. A communication process of censure and understanding calls for a common moral basis of communication which must be represented in the law for the penal/moral censure. Because such “shared values” have developed within communities, and traditionally in a local value system, normative systems established on that basis – such as criminal law – are also oriented to the local context and the nation state. This raises the question whether it is actually possible to establish an overall moral community or a common moral denominator within the circles addressed by international criminal courts which would, in the first place, be the precondition under the expressive penal theories for moral censure against the offender.

5.3 *In Whose Name?*

Considering the historical and social reality, it becomes apparent that in criminal law there are a surprising number of similarities across cultures as regards both a significant proportion of the offences and procedural principles.³⁸ In addition, a high level of consensus regarding the evaluation of the seriousness of those offences can be seen.³⁹ Despite this common moral foundation, it remains unclear, however, who Praljak or Mladić are actually facing – or, to take up the ideas of Antony Duff, in whose name do the courts judge? Do they judge as representatives of humanity itself? Do they judge in the name of the international community? Or do they even judge in the name of the political-national community to which the perpetrator actually belongs?⁴⁰ There is no clear answer to this question. The conclusion will nevertheless be reached that punishments or censures should preferably always happen in the local community from which the relevant actors (perpetrators, victims, judges) come.⁴¹ Against this background, international criminal courts will always be an

³⁵ *Ibid.*, p. 42.

³⁶ Zürcher (2014), p. 84.

³⁷ *Ibid.*, p. 85.

³⁸ Höffe (1999), p. 367 et seq.

³⁹ Neubacher (2006), p. 29.

⁴⁰ Duff (2014), p. 19.

⁴¹ *Ibid.*, p. 19.

imperfect and thus flawed forum, especially since they can never fully replace the community to which the perpetrators should actually answer.⁴² Accordingly, they cannot speak on behalf of that community, but they can do so in its interest, as is implicit in the principle of complementarity in the relationship between the ICC and national criminal courts.⁴³ It is important, however, to give proper consideration to these difficulties. The protest which is sometimes voiced and the resentment that international criminal justice has ‘stolen’ a case from national criminal justice is because in this transitional process something is always lost,⁴⁴ which requires the courts to keep the distance – geographical, linguistic, but also as regards the legal system – as small as possible.

6 Conclusion

The circumstances surrounding international criminal courts, therefore, do not make it easy for the proponents of expressive penal theories. It is true that the moral background which is required for the process of censure and understanding can also be established for such courts. At the same time, however, it cannot be denied that punishment has the most lasting impact in the local community. The formal conviction of Praljak could still have taken place. The fact that he evaded the punitive sanction by his death, which was certainly not enforced, does not represent a “declaration of surrender” to the authority of the court,⁴⁵ but a breakdown of dialogue and a betrayal of the hope of the victims of his crimes, and also of the general public, that he would be brought to understand the damage he had caused and, by serving his sentence, would make a contribution to reconciliation.⁴⁶ International criminal courts may always be only a “second-best kind of criminal justice,”⁴⁷ but, as has been stated, this should not prevent offenders being censured for their offences and being held accountable for wrongdoing at that level. Nevertheless, they must be allowed one thing: they must be addressed as responsible human beings and not locked away as “*hostis humani generis*.”⁴⁸ Conversely, punishment should make offenders understand that other people genuinely experienced suffering as a result of their acts and that the suffering must affect them because it was inflicted upon people to whom they cannot be indifferent since they are their peers.⁴⁹ Accordingly, it must be hoped that renewed attention will be given to the debate over the purpose of punishment in international criminal law, which has been

⁴² *Ibid.*, p. 20.

⁴³ *Ibid.*, p. 19.

⁴⁴ *Ibid.*, p. 20.

⁴⁵ Willeke (2017).

⁴⁶ A similar example with a similar conclusion can be found in Sachs (2015), p. 326 et seq.

⁴⁷ Duff (2014), p. 20.

⁴⁸ *Ibid.*, p. 18.

⁴⁹ Strub (2008), p. 347.

conducted fairly poorly thus far, through the greater emphasis on the communicative and thus moral aspect of punishment, as there would appear to be considerable unrealised potential here, especially for the level of international criminal law.

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The Enforcement of the EEA Agreement by the EFTA Surveillance Authority: Enhancing Welfare and Prosperity



Sven Erik Svedman

1 Introduction

It is a great honour for me to contribute to this Festschrift for Professor Carl Baudenbacher. Professor Baudenbacher has served the EEA Agreement and the parties to it for a long time – both in his role as a Judge and the President of the EFTA Court, and also as an outspoken, forthright, creative ambassador of the Court and its case-law.

The theme of this Festschrift is the “*art of judicial reasoning*”. As someone who is trained as an economist rather than as a member of that peculiar species known as *Homo Iuridicus*, I will seek to examine how judicial reasoning can contribute to the enhancement of welfare and prosperity. As a former President of the EFTA Surveillance Authority, I thought it fitting to examine ESA’s contribution to these goals.

Macroeconomic research indicates that not only is long-term real GDP growth per capita strongly correlated with an increase in litigation, but the same appears to be true for shorter periods of negative growth.¹ There is in my view little reason to think that this is not also true for litigation concerning the EEA Agreement and the vast body of rules incorporated into its annexes.

In other words, the enforcement of the EEA Agreement – whether by private parties or by an international public body such as the EFTA Surveillance Authority (“ESA”) – is likely to fluctuate over time, and is as such a function of broader forces and movements in the societies they are embedded in and in which they operate.

However, as I see it, a well-functioning EEA Agreement itself contributes to economic growth and prosperity. This should be an important goal for ESA in its enforcement practice.

Former President of the EFTA Surveillance Authority.

¹Clemenz and Gugler (2000), p. 215.

S. E. Svedman (✉)
Oslo, Norway

A crucial caveat in that respect is to avoid both the pitfall of under-enforcement and the pitfall of over-enforcement: the amount of enforcement should in principle be *optimal*, although this objective will of course never be fully realised. Just to take a few examples: like any organization, ESA is subject to budgetary constraints and has to prioritize. ESA's very able staff will also have to choose *among* complex and difficult cases, often in challenging societal and political contexts. They will likewise have to choose *how* to pursue such cases and they will not have perfect and full information when doing so. These are just some obvious and general constraints on the public enforcement side which makes optimal enforcement impossible. Nonetheless, it is an important target to bear in mind not only when choosing which cases to pursue and how, but also directly in legal reasoning.

In my contribution I will discuss how ESA contributes to enforcement of the EEA Agreement. A large part of this takes place through the infringement procedure against the EEA/EFTA States, which ultimately may end in litigation before the EFTA Court. However, a significant part of ESA's work in ensuring the enforcement of the EEA Agreement is also to encourage or empower private parties to play a leading role in enforcement matters.

As we shall see in the following examples, although the actual immediate topic of cases may of course vary, a surprising number of the cases before the EFTA Court, including Advisory Opinion cases, directly and indirectly concern different aspects relating to the effectiveness and utility of enforcement.

2 Enforcement of the EEA Agreement: ESA's Hybrid Role

2.1 Introduction

ESA was established through the Surveillance and Court Agreement ("SCA").² Under Article 5 SCA, ESA's role is threefold: first, it is to ensure that the EEA/EFTA States fulfil their obligations under the EEA Agreement and the SCA; second, it is to ensure that the competition rules are applied; and third, it is to monitor how the other States party to the EEA Agreement apply it. If we examine the first two tasks more closely, it becomes apparent that both ensuring that the EEA/EFTA States fulfil their obligations, and that the competition rules are applied, will involve private parties in addition to the states.

Three EFTA Court cases, in which ESA has recently been involved, can serve to illustrate how a private complaint may lead to enforcement of the EEA Agreement directly against a state; how ESA can become involved when EEA rules are enforced directly between private parties before domestic courts, and how ESA can play a role in both the private and public application of the competition rules. These cases

²OJ L 344, 31.1.1994, p. 3.

also show how private and public enforcement are essentially intertwined in the EEA.

The selected cases concern areas and modes of reasoning which I believe are particularly dear to Professor Baudenbacher, since anyone even vaguely familiar with his vast amount of scholarly writing will be aware that economic aspects of law and legal reasoning is an overarching theme to which he frequently returns.

2.2 Case E-4/17: *ESA v Norway (Parking Facility in Kristiansand)*

Case E-4/17 *ESA v Norway* – which for convenience I shall refer to as the *Kristiansand* case – concerned the construction and operation of an underground car park under Torvet in Kristiansand, Norway.³ The technical legal question in the case was whether the municipality's tender procedure had been conducted in accordance with EEA public procurement rules.⁴ ESA submitted (inter alia) that the tender notices should be advertised throughout the EEA, and that sufficient time should be allowed for the submission of tenders.

The Court concluded that the municipality had not followed these requirements and that the Government of Norway, as the responsible party under the EEA Agreement, therefore had acted in breach of the rules.

An important foundation for the Court's reasoning was "that one of the main objectives of [Directive 2004/18/EC, the public procurement directive in question] is to ensure the development of effective competition in the field of public contracts."⁵ The Court continued by describing how this was confirmed by the preamble to the directive requiring "that contract notices drawn up by the contracting authorities of EEA States be advertised throughout the EEA and, furthermore, that the information contained in such notices would enable economic operators to determine whether the proposed contracts are of interest to them."⁶

The case was brought to the attention of the Authority following a complaint from a private party and garnered much attention in the local press in the area of Kristiansand where the underground car park was built and operated. On the face of it, this case seemed to concern purely local issues in a Norwegian municipality. However, the case turned out to be very interesting from ESA's perspective because it revealed wider systemic problems. As such, it should be interpreted as an important signal that when ESA discovers what it takes to be systemic problems regarding the correct application of the procurement rules in the EEA/EFTA States, it takes

³Case E-4/17, *ESA v Norway* ("*Kristiansand*"), 21 March 2018, not yet reported.

⁴Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114, as corrected by OJ 2004 L 351, p. 44).

⁵Case E-4/17, *Kristiansand*, cited above, paragraph 68.

⁶*Ibid.*

the issue very seriously. This case is also important for our purpose here because it appears from the facts of the case that the complainant would lack standing in national courts. Private enforcement was, in other words, not likely to have been available for the complainant.

This also refers to another crucial aspect of public enforcement: ESA is located outside the EEA/EFTA States and therefore has to contend with an obvious informational challenge – which is even greater for cases that do not concern more easily discoverable infringements, such as laws and regulations which are not in conformity with the EEA Agreement. It is therefore immensely important to have the complaints system to inform ESA of systemic issues in this type of cases. At the same time, the complaints mechanism gives citizens a direct link with ESA, and brings Brussels closer to the EEA/EFTA States.

From the perspective of enforcement, a complaints mechanism can also lead to some difficulties for an organization like ESA, which is subject to budgetary constraints. This means that there is a balance to be struck between wanting to generate a large volume of complaints in order to get a good overview of possible issues, and the need to then prioritise – with the consequence that ESA may need to refrain from taking action on complaints received.

Further in this perspective, as ESA saw it, and as the Court pointed out, the role of the public procurement rules is to facilitate a competitive procurement process by encouraging actors from within the whole EEA to participate in the bidding. If the rules had been followed, the best offer may still have come from the party that was chosen – but perhaps a better offer would have been received from somewhere else. This in turn, could have saved the taxpayer money.

I do not know whether any other company would have considered participating in a correctly conducted tender procedure. However, if that were the case, such a company could in principle bring a case directly against the municipality before the domestic courts and claim damages for any losses they may have incurred. While this option was likely not relevant for the complainant in this case, in general this combination of private damages claims following public enforcement is in my view a means to foster both deterrence – in order to ensure the rules are not breached – and compensation, in case they are. As such the goal of enforcement from the perspective of infringement cases is to ensure a level playing field and, perhaps paradoxically, to ensure that public enforcement becomes unnecessary.

To sum up, the Kristiansand case showed that ESA is willing to take action on seemingly local public procurement cases which reveal wider systemic issues. The goal is to ensure that the rules are followed so that tender procedures concerning public facilities and funded by the public are conducted in an efficient manner, with all relevant competitors being able to take part.

The next case I will look at is an example of another public procurement situation, where the focus of the case was precisely on the competitors for the tender and the private consequences of public procurement procedures. In my view, the combination of these two cases is particularly important from the perspective of ESA's enforcement role.

2.3 Case E-16/16: *Fosen-Linjen AS v AtB AS*

Unlike the Kristiansand case, this case was not an infringement action but began as a request for an Advisory Opinion to the EFTA Court by the Frostating Court of Appeal in Norway. Because of the relatively protracted proceedings in the case and the path taken by Norwegian courts after the Advisory Opinion, it is worth examining in some detail.

The request for Advisory Opinion concerned questions related to a claim for damages for loss sustained as a result of a breach of EEA public procurement law. In 2013, Fosen-Linjen, a small Norwegian ferry operator, had submitted a tender for a contract on ferry services for 10 years in Sør-Trøndelag County in Norway. The tender procedure was organized by AtB, a company charged with planning, promotion and procurement of public transport services in the county.

AtB decided to award the contract to Norled, another ferry operator. This was based on an assessment of the tenders, where price was weighted at 50%, quality at 25% and environment at 25%. In practice, the environment criterion mainly concerned the fuel oil consumption of the ferries the competitors would operate. However, the invitation to tender did not require the tenderers to provide any documentation relating specifically to the criterion on environment. In other words, there was no requirement to document fuel oil consumption. After a meeting with potential tenderers prior to the award, AtB had been asked to put in place a documentation requirement, but chose instead to introduce a monetary sanction if actual consumption turned out to be higher than promised.

Upon a request from Fosen-Linjen in early 2014, Sør-Trøndelag District Court issued an interim measure ordering AtB to refrain from concluding the contract with Norled. This decision was upheld by Frostating Court of Appeal on 27 March 2014. Following this decision, AtB cancelled the tender. Prior to the decision of the Appeals Court in the interim measures case, Fosen-Linjen submitted a lawsuit to Sør-Trøndelag District Court, where it (inter alia) claimed damages. It requested that the court should award damages calculated either positively (as if the contract would have been awarded to it) or negatively (at least to recover its costs). The claim was rejected by the District Court on 2 October 2015. Upon appeal, the Frostating Court of Appeal stayed the proceedings and made a reference to the EFTA Court for an Advisory Opinion.

The six questions before the EFTA Court were, in essence, related to the severity of the errors made by AtB in light of Directive 89/665/EC (the “Remedies Directive”)⁷ and whether these reached a sufficient threshold for AtB to be liable. The threshold issue was in my view the key question of the case and something which is very important from the perspective private enforcement. In general the questions concerned whether the Remedies Directive required there to be a remedy

⁷Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33).

for conduct such as that of AtB, and whether a remedy would be available for a competitor such as Fosen-Linjen.

In its Written Observations, ESA referred to the *Strabag* judgment of the Court of Justice of the European Union (“CJEU”).⁸ According to the Observations,

In *Strabag* the CJEU considered a rule in Austrian law that made the right to damages for an infringement of public procurement law by a contracting authority conditional on that infringement being culpable. The rule was coupled with a presumption that the contracting authority was at fault and a rule precluding the contracting authority from relying on a lack of individual abilities in its defence against a claim for damages.

According to ESA, the CJEU held that Article 2(1)(c) of the Remedies Directive “precludes national rules that make damages conditional on the infringement being culpable, regardless of whether the burden of proof is imposed on the contracting authority or whether the grounds on which the contracting authority can rely are limited.” This was important to ESA, and relevant in the present context, because the essence of the case in ESA’s view was that such conditional rules “would in practice make it impossible or excessively difficult for a tenderer to exercise the right to effective review procedures.”⁹

Nonetheless, ESA noted that it found this approach “difficult to reconcile”¹⁰ with the approach taken by the CJEU in the subsequent *Combinatie* case.¹¹ In *Combinatie*, the CJEU followed a different approach than in *Strabag* and held that Article 2(1)(c) of the Remedies Directive was “a concrete expression of the general principle of State liability for loss and damage caused to individuals as a result of breaches of EU law.”

ESA then submitted that the state would be liable for such loss or damage when three conditions were met: “(1) the rule of EU law infringed must be intended to confer rights on the individual that has sustained the loss or damage; (2) the breach of the rule must be sufficiently serious; and (3) there must be a direct causal link between the breach and the loss or damage.”¹² Importantly, ESA added that the CJEU had held that as long as there are no EU harmonising rules available, “it is for each State to determine those criteria, subject to the principles of equivalence and effectiveness.”

The Authority suggested that this line of reasoning should be followed by the EFTA Court as well. Although this was based on several arguments, for our purposes the most interesting of ESA’s arguments was when ESA pointed out that “the effectiveness of EU’s own public procurement rules is sufficiently ensured by a liability limited to sufficiently serious breaches, the effectiveness of EU public

⁸ CJEU judgment of 30 September 2010 in Case C-314/09, *Strabag and Others*, EU:C:2010:567.

⁹ Written Observations by the EFTA Surveillance Authority in Case E-16/16, *Fosen-Linjen*, 30 January 2017 (Document 838544) paragraphs 33–37.

¹⁰ Written Observations by the EFTA Surveillance Authority in Case E-16/16, *Fosen-Linjen*, 30 January 2017 (Document 838544) paragraph 43.

¹¹ CJEU judgment of 9 December 2010 in case C-568/08, *Combinatie Spijker*, EU:C:2010:751.

¹² *Ibid.*, paragraph 41.

procurement rules in the Member States would presumably be sufficiently ensured by State liability for serious breaches of EU law only.”

This approach was also implicit in the reasoning of the CJEU in *Combinatie*, which as mentioned also referred to the “principles of equivalence and effectiveness.” Here, it suffices to say that the principle of equivalence entails that “national procedural rules governing actions for safeguarding rights which individuals derive from EEA law must not be less favourable than those governing similar domestic actions.”¹³ The principle of effectiveness in our context, on the other hand, requires that national rules on the right to seek damages “must not make it practically impossible or excessively difficult to exercise” the rights given to an individual under EEA law.¹⁴

So ESA was to a large extent concerned with the effectiveness of the EEA public procurement rules in the national setting, as well as pointing out that procedural rules in order to safeguard rights under these rules had to be no less favourable than those ‘governing similar domestic actions.’ In my opinion, this argument about equivalence also involves an understanding of domestic enforcement: while it is not easy to say what ‘similar domestic actions’ would mean in practice, the EEA rules should be at least as enforceable before a national court as “purely” national ones – but they would not need to go further than that.

How did the Court’s reasoning correspond to ESA’s arguments on this point? As in the *Kristiansand* case the Court began by examining the purpose of Directive 2004/18/EC. In this setting, it appeared to frame this purpose in a somewhat broader manner than it would do in *Kristiansand*: “to simplify and modernise the national procedures for the award of public contracts, in order to facilitate the freedom of movement of goods, the freedom of establishment, the freedom to provide services and the opening-up of such contracts to competition.” Furthermore, the Court pointed out that this would be supported by the system established by the Directive because it would serve to “avoid distortions of competition between private tenderers and to ensure compliance with the principles of transparency, nondiscrimination and equal treatment.”¹⁵ The Court then noted that even though tenders such as the one discussed in the case concern *public* procurement, the act of conducting such tender procedures are rather to be considered as private or commercial acts. Therefore, the rules in that Directive are also meant to “protect the interests of traders.”¹⁶

Having made this observation, the Court turned to the Remedies Directive at issue in the case. It noted that a fundamental objective of this Directive

¹³ EFTA Surveillance Authority, Written Observations in Case E-10/17, *Nye Kystlink*, 8 February 2018 (Document no. 894265), paragraph 20, referring i.a. to Case E-11/12 *Beatrix Koch v Swiss Life (Liechtenstein)* AG [2013] EFTA Ct. Rep. 272, paragraphs 121, 122.

¹⁴ EFTA Surveillance Authority, Written Observations in Case E-10/17, *Nye Kystlink*, 8 February 2018 (Document no. 894265), paragraph 48, referring i.a. to Case E-11/12 *Beatrix Koch v Swiss Life (Liechtenstein)* AG [2013] EFTA Ct. Rep. 272, paragraphs 121, 132.

¹⁵ Case E-16/16 *Fosen-Linjen AS v AtB AS*, paragraphs 61 and 62.

¹⁶ *Ibid.*, paragraph 68.

is to create the framework conditions under which tenderers can seek remedies in the context of public procurement procedures, in a way that is as uniform as possible for all undertakings active on the internal market. Thereby, as is also apparent from the third and fourth recitals to the Remedies Directive, equal conditions shall be secured. This will ultimately contribute to the opening-up of procurement markets to competition across the EEA.

It observed additionally that these rules are *also* designed to protect tenderers against arbitrary conduct on the part of contracting authorities organising a tender procedure. On this basis, the Court pointed to the *Combinatie* case, which ESA had generally suggested that it should follow, and added the qualification that national rules must observe ‘principles of equivalence and effectiveness’, as explained above. Interestingly, the Court added that the rules of the Remedies Directive had to “be interpreted in light of fundamental rights, in particular the right to an effective judicial remedy.”¹⁷

Having established this framework, the Court noted that sometimes damages are the only effective remedy. This served as a starting point for an exploration of the objective of damages; a discussion which is highly relevant for our topic of public and private enforcement:

damages seek to achieve a three-fold objective: to compensate for any losses suffered; to restore confidence in the effectiveness of the applicable legal framework; and to deter contracting authorities from acting in such a manner, which will improve future compliance with the applicable rules. Liability through damages may also provide a strong incentive for diligence in the preparation of the tender procedure, which will, ultimately, prevent the waste of resources and compel the contracting authority to evaluate the particular market’s features. Were liability to be excluded, this may lead to a lack of restraint of the contracting authority.¹⁸

I consider that the incentive effect of damages which the Court refers to is crucial. The key, however, is to make such rules effective: in principle they should entail what economists would consider efficient incentives.

I think it is clear that such rules would make private enforcement of a breach easier, and would therefore seem to encourage private enforcement. They would be likely also to encourage the deterrence element from the perspective of those in charge of organising tender procedures, and make them take the necessary precautions in order to avoid liability. As the Court put it, any limitation on damages rules might “decrease their diligence in conducting a tender procedure.”¹⁹ One additional element of this reasoning is that it relies on the assumption that the likely *consequences* of one kind of behavior *affect* that behaviour.

On this basis the Court held that even simple breaches were sufficient to allow a claim for damages.

At this stage, it is clear that the reasoning of both ESA and the EFTA Court was strongly imbued with economic reasoning and that both sought to reason in a way

¹⁷ *Ibid.*, paragraph 72.

¹⁸ *Ibid.*, paragraph 76.

¹⁹ *Ibid.*, paragraph 78.

which would encourage private enforcement. One important caveat in that respect, however, is, as I noted in the introductory part of this contribution, that while this is an important goal, it is equally important to avoid *over-enforcement*. For instance, if a contracting authority is too concerned with avoiding liability because of the low liability threshold, it could become excessively cautious when arranging tenders.

A rule such as the one introduced here may, in isolation, in my view possibly have such a consequence. The Court did, however, address this issue elsewhere in the judgment, when it called for a necessary

balance between the different interests at stake. While liability of the contracting authority for any errors committed promotes, in principle, the overall compliance with the applicable legal framework, exaggerated liability of the contracting authority could lead to excessive avoidance costs, reduce the flexibility of the applicable framework and may even lead to the unjust enrichment of an unsuccessful tenderer. Furthermore, excessive liability may provide an incentive for a contracting authority to complete award procedures, that were evidently unlawful, or impinge upon the freedom to contract.²⁰

In this context the Court referred to, for instance, rules on causality which could be applied in such a manner that they help to avoid exaggerated liability. Consequently, while ESA and the EFTA Court differed in their reasoning, both seemed to seek to interpret the rules in a manner that encouraged private enforcement while preventing over-enforcement.

However, the *Fosen-Linjen* saga did not end there. On 2 March 2018, the referring court handed down its judgment²¹ – and decided not to follow the EFTA Court on the question of the threshold for liability. Instead, it stated that in a situation where the issue of liability was not clearly decided by the CJEU, where there were varying opinions in the domestic courts within the EEA and where the EFTA Court's opinion was not “clearly correct”, it would follow the case law of the Norwegian Supreme Court instead.²²

I understand that this case has been appealed to the Supreme Court, and so neither ESA nor the EFTA Court has in principle seen the last of it. It is possible that the Supreme Court could request a new Advisory Opinion from the EFTA Court. For that matter, it would presumably also be possible, at least in theory, if the Supreme Court were to expressly reject the approach taken by the EFTA Court, that this could turn into an infringement case which would allow the EFTA Court to examine the matter again. The interaction between public and private enforcement of EEA rules will be crucial for what happens next.

This interaction is also paramount in the next case I will look at, but there in a quite different setting.

²⁰ *Ibid.*, paragraph 101.

²¹ Frostating Court of Appeal, judgment of 2 March 2018, 15-187242ASD-FROS.

²² *Ibid.*, pp. 22–23 (In Norwegian: “og at EFTA-domstolens rådgivende uttalelse på dette punkt ikke fremstår som klart riktig”).

2.4 Case E-10/17: *Nye Kystlink AS v Color Group AS and Color Line AS*

This case (which at the time of writing has not yet been decided) has a strong link to a competition case concerning a fine of EUR 18,811,000, which the Authority issued on 14 February 2012 against Color Line AS, a Norwegian company which operates ferry services between Norway and Sweden, Denmark and Germany.²³

As such, this case already serves as a good illustration of the interplay between public and private enforcement and how ESA can take various initiatives to encourage the latter as a way to promote efficiency in the EEA and thereby contribute to increased welfare and prosperity.

The original case, and the fine issued by ESA, concerned an exclusivity clause in a harbor agreement between Color Line and the Municipality of Strömstad, Sweden. In 2005, Kystlink AS (later to be called “Nye Kystlink AS”), another Norwegian ferry operator, lodged a complaint concerning agreements entered into and practices engaged in by Color Line AS. Following lengthy investigations, which included inspections at the premises of Color Line and associated companies in 2006, a Statement of Objections in 2009 and an oral hearing in 2010 (encompassing both Fjord Line AS and Bastø Fosen AS, two other competitors of Color Line), ESA in 2012 reached the following conclusion:

The Authority concludes that from 1 January 1994 to 20 December 2005 the long-term exclusive rights enjoyed by Color Line pursuant to the 1991 harbour agreement to use the harbour facilities at Torskolmen in Strömstad had the effect of preventing, restricting or distorting competition within the meaning of Article 53(1) EEA. The Authority further concludes that Color Line has not shown that the conditions laid down in Article 53(3) EEA are satisfied.

The Authority also concludes that from 1 January 1994 to 20 December 2005 the long-term exclusive rights enjoyed by Color Line pursuant to the 1991 harbour agreement to use the harbour facilities at Torskolmen in Strömstad were, at the very least, capable of restricting competition. The Authority further concludes that Color Line has not shown that there was any objective justification for maintaining its exclusive rights in force from 1 January 1994 until 20 December 2005, and that Color Line therefore abused its dominant position on the relevant market within the meaning of Article 54 EEA.

Therefore, Color Line’s conduct constituted an infringement of Articles 53 and 54 EEA.²⁴

The fine was accepted by Color Line. Subsequently, two of Color Line’s competitors, Bastø Fosen and Nye Kystlink, initiated claims for damages before the Norwegian domestic courts. The first of these cases went to the Borgarting Court of Appeal. Bastø Fosen had claimed damages limited upwards to NOK 1 billion. The question before the court was whether the damages claim was time-barred under Norwegian law.²⁵ A key question in that respect was when the limitation period

²³ EFTA Surveillance Authority, Decision of 14 December 2011 Relating to proceedings pursuant to Articles 53 and 54 of the EEA Agreement (Case No. 59120 Color Line, Dec. No: 387/11/COL).

²⁴ *Ibid.*, paragraphs 607–609.

²⁵ Borgarting Court of Appeal, judgment of 22 September 2014 (case LB-2013-178315).

started to run. In that case, ESA for the first time used its power under Article 15(3) of Chapter II of Protocol 4 SCA to submit *amicus curiae* observations to a Norwegian court.²⁶ In its submission, ESA emphasised that competition law enforcement:

takes two forms: (i) public enforcement by competition authorities; and (ii) private enforcement by those who have suffered harm as a result of infringing conduct. Both forms of enforcement are crucial to the effective enforcement of the EEA competition rules. While each form serves a common purpose – the public interest in ensuring that competition is undistorted – each form also serves a different, yet complementary purpose: public enforcement is aimed primarily at deterrence with significant financial penalties imposed on infringing parties; while private enforcement is primarily designed to compensate the victims of anti-competitive conduct, through damages.²⁷

I might add that, first, public enforcement may also have a compensatory effect from the public perspective: generally, anti-competitive conduct hurts the public and may cause losses to welfare and prosperity. A fine imposed for such conduct puts money back in the public purse. Conversely, as seen in the *Fosen-Linjen* case, private enforcement may also have an important deterrent effect. Indeed, ESA also pointed out that the EFTA Court itself has encouraged the enforcement of the EEA competition rules by private parties, because “it can make a significant contribution to the maintenance of effective competition in the EEA.”²⁸

ESA observed, in the context of the issuance of fines for breaches of the EEA competition rules, that when ESA has taken steps in relation to public enforcement, as a matter of principle “it is of the view that any limitation period for antitrust damages claims should be interrupted or suspended until a decision of the Authority finding an infringement of EEA competition law becomes final (or the proceedings are otherwise terminated).”

ESA went on to explain that in its view

the starting point for the limitation period, or its length, should be such that the potential victims are able to bring a damages claim after an infringement decision by the Authority has become final. Until a breach of EEA competition law has been confirmed by such a decision, a private party has not assurance of the existence of an infringement. Taking into account the complexity of proving a breach of EEA competition law [...] it will normally be very challenging for a private party to initiate or carry on damages proceedings in the absence of such a decision.²⁹

In general, ESA referred to the principle of equality and the principle of effectiveness and suggested that the national court could take these into account in order to determine the starting period. It also pointed to the possibility that the Court of Appeal could request the EFTA Court to give an Advisory Opinion. Borgarting

²⁶ This power is implemented in Section 9 (2) of the Norwegian EEA Competition Act.

²⁷ See EFTA Surveillance Authority, Written Observations to Borgarting Court of Appeal, 28 July 2014 (case no 75554) 25, paragraph 7.

²⁸ *Ibid.*, paragraph 10, referring to i.a. Case E-14/11 *Schenker I* [2012] EFTA Ct. Rep. p. 1178, paragraph 132.

²⁹ *Ibid.*, paragraph 21.

Court of Appeal chose not to do this and held that the damages claim was time-barred.

The damages claim against Color Line from Nye Kystlink was likewise brought to the Borgarting Court of Appeal after Oslo District Court held that its claim was also time-barred. However, in Nye Kystlink's case the Court of Appeal decided to make a reference to the EFTA Court for an Advisory Opinion. The questions referred centered on the principle of equivalence and the principle of effectiveness with reference to the Norwegian Limitation Act.

Regarding the principle of equivalence, ESA emphasised, *inter alia*, in the proceedings before the EFTA Court that the primary purpose of a private law action for damages is compensation, while deterrence has a secondary effect. Because the *purpose* of a private law action was similar regardless of whether the original public enforcement decision (i.e. the fine) was taken by ESA or was imposed by the State for a domestic criminal offence (such as a domestic competition infringement), similar limitation rules should apply to the private law action.³⁰

With respect to the principle of effectiveness, an important perspective for ESA was that because competition cases are often very complex and are characterized by information asymmetry, effective rules would often require private enforcement (in domestic courts) to wait until public enforcement (the decision of the Authority) is completed. If the limitation rules make this impossible, they could lessen the effectiveness of private enforcement and therefore undermine an important part of the compensation and deterrence effect that an effective competition law regime requires.³¹

It will be very interesting to see how the EFTA Court and the Borgarting Court of Appeal resolves this issue, which requires a good understanding of the complicated facts of the case and an elegant analysis of the difficult interplay between EEA principles and technical national rules.

3 Concluding Remarks

In the preceding sections I have looked at the reasoning of the EFTA Surveillance Authority in three recent cases before the EFTA Court, which all concerned enforcement in cases related to economic rights and a combination of the private and public powers used for safeguarding them. I have argued that the arguments provided by ESA on EEA law in these cases to a large extent sought to empower private parties to enforce their own rights.

Furthermore, it seems clear to me that this empowerment of private enforcement is first and foremost channelled through ordinary domestic means, such as the national courts. I think it is underappreciated that the actions taken by the institutions

³⁰ EFTA Surveillance Authority, Written Submissions in Case E-10/17 *Nye Kystlink AS v Color Group AS*, 8 February 2018 (Document no. 894265), paragraph 25.

³¹ *Ibid.*, paragraphs 51–53.

in Brussels and Luxembourg in this sense and in this area – in the form of decisions and judgments – lead to a strengthening of, and indeed an increased role for, national judges and national law.

When looking at the role the EFTA Court has played under Professor Baudenbacher's presidency, I believe that this effect – this legacy – is clearly discernible. Especially in the *Fosen-Linjen* case, as shown above, one can find a willingness to explore with intellectual force, and the necessary creativity and originality, empowering reasoning that affects not only economic operators, but also national courts and the role that they can play in the development of EEA law and the exercise of rights under it. This is sometimes a direct role, such as when a case would be brought before the national courts, but just as much an indirect role, in the sense that parties will tend to behave in accordance with the expected outcome of a case brought before these same courts.

From an enforcement perspective, this means that enforcement is most effective when it is not needed at all. However, the shadow of deterrence must absolutely not grow too large – if that happens it might have a choking effect on the economy rather than helping it thrive. Indeed, in sophisticated social market economies, such as those characterising the EEA/EFTA States, there must be room for economic operators to experiment, to try and fail, to cooperate and collaborate within the confines of legal boundaries, and yes, even to make mistakes when dealing with complex matters of economic law. However, when the errors become too many and the mistakes become too grave, compensation may be due to competitors for any losses caused. This is the complex balancing act which enforcement of the EEA Agreement requires, and towards which the EFTA Court, the EFTA Surveillance Authority and the EEA/EFTA States should continue to strive.

Reference

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Part II

Justice and Judiciary

Judges: Servants of the Law – But Also Servants of Justice?



Irmgard Griss

1 Introduction

I am often asked whether, as a judge, I ever had to take decisions that I felt to be unjust. This is a tough question since a judge is required to establish the facts and to apply the law to those facts. The acid test is not whether the judgment is just, but whether it is lawful; that is to say, whether the correct law was applied and whether the law was applied correctly. Another important question is, of course, whether the established facts mirror the actual circumstances of the case. Does this mean that justice is wholly irrelevant as a benchmark for court decisions? I hope not, and in my decisions I have always endeavoured to do justice to the particular circumstances of the individual case. Naturally, I cannot say if those concerned felt the same.

From a formal point of view, justice means treating like cases alike and unlike cases differently. But what is alike? And what is different? To answer these questions it is necessary to make value judgments; and value judgments are always subjective. There is a maxim repeatedly peddled out by judges – I hope it is entirely fictitious – “You can get a judgment from me, but not justice”. This maxim is the exact opposite of what people expect from the courts. Anyone who turns to a court hopes to gain redress and to see justice done. It could be argued that justice is a basic human need. This can be seen even in small children. Nothing annoys them more than the feeling of being treated unjustly.

But can a judge actually boast of having taken a “just decision”? The first doubts start to emerge in attempting to define what conditions a decision must satisfy in

Member of the Austrian Parliament, and former President of the Austrian Supreme Court. Translated from German by Harvey Jessop.

I. Griss (✉)

Austrian Parliament, Vienna, Austria

order to be considered just. So is it not presumptuous for judges to say they have taken a just decision? Isn't justice an ideal that can only ever be approached? What role is played by the organisation of the judiciary and, above all, the criteria for the selection of judges in determining whether judicial decisions can be measured against the benchmark of justice? Ultimately this is the general environment in which judicial office is exercised. These are questions I wish to address in my contribution from the perspective of the Austrian judiciary.

In saying this, I am well aware that, especially when it comes to this subject, there are considerable differences between exercising judicial office at a national court, even a supreme court, and serving as a judge at a supranational court like the EFTA Court. For judges at national courts the case-files reflect life in all its breadth and diversity. Judges there are closer to the people and it is easier to empathise with those concerned and to see things through their eyes. One cannot help but ask the question whether what I am deciding in this instance is just. I nevertheless hope that my reflections will also be of interest to the man who is being honoured, whose work I have come to value so highly in quite another context.

2 Self-Image of Judges

The following remark is attributed to Elihu Root, the US statesman and lawyer, and winner of the Nobel Peace Prize in 1912: "About half of the practice of a decent lawyer is telling would-be clients that they are damned fools and should stop." A very pessimistic viewpoint or perhaps just a very realistic one? And can this be applied to judges? Is it not true that judges too are confronted again and again with cases in which, as I myself have sometimes thought, it would be preferable for both parties to lose and for each party to be ordered to bear the full costs?

Such an appraisal implies a certain self-image. If judges see themselves as public servants whose task is to deal with cases – the more, the better, the quicker, the better (in China – as I learnt from a lecture by a colleague at a conference in Beijing – it is even specified by a sort of mathematical formula how many judgments a judge must deliver in a month) – they will not really consider whether the proceedings and the decision can be justified from the point of view of the public interest, as it is more or less immaterial to them what is actually at issue in the cases.

Judges will see things differently if they view the judiciary as guarantors of the rule of law and thus as guarantors of peaceful coexistence, as this means that the judicial system may not be misused to obtain undue advantages. In addition, the way in which the judicial system is arranged must justify the confidence that judges will, to the best of their knowledge and belief, decide independently and free from influence. This is the precondition for people refraining from employing force to obtain their – real or supposed – rights. Only then is peaceful coexistence based on fundamental rights and individual freedoms possible and only then will confidence in the rule of law, the foundation of democracy, be built. A crucial factor is the external perception created by the judicial system and the courts in particular. As the

European Court of Human Rights states in its settled case-law: Not only must justice be done, it must also be seen to be done.

Unfortunately, there is little public awareness of the great value of an independent judiciary governed by the rule of law. When judges raise the subject of party-political influence in appointments to senior judicial posts and insist on co-determination, then – as happened recently in Austria – there is media criticism that the judges want to choose their own boss. This criticism is based on a fundamental misunderstanding. Judges do not have a boss who tells them how to conduct proceedings and what decision they should take. This is true from the first day of any judicial activity. It also means, however, that judges must be clear as to how much responsibility they have. I became very aware of this when, as an only recently appointed judge – I had previously worked at a law firm – I delivered a judgment, which could be challenged only to a limited extent because of the merely small amount involved. I remember how I hesitated in signing the judgment as I realised that the defendant would be forced to pay the amount awarded to the applicant if he was not willing to do so voluntarily.

The self-image of judges must therefore be shaped by both independence and responsibility. A person who is not subject to instructions and is, thus, independent must take responsibility for what he does and what he fails to do. This applies not only to the decisions taken by a judge, but also in particular to the way in which proceedings are conducted.

Acceptance of a decision depends to a very large extent on whether it is the culmination of proceedings that are perceived to be fair. *Audiat et altera pars* must be a given for a judge; this principle must inform the judge's attitude and conduct, as nothing is more disconcerting for people than the feeling of being confronted with a preconceived opinion, of not being heard, of not getting through to the person who is deciding their case.

Language is crucial in this regard. Judges require legal knowledge, of course, and must know or at least be able to find out what rules are applicable to a given situation. They must also be in a position to understand and interpret legislation. This calls for a certain basic dogmatic knowledge.

At least as important, if not more so, however, is the ability to understand and to make oneself understood, both in proceedings and in the judgment. There is no place for legalese either in the proceedings or in the judgment. There have been a few times in my experience when trainees have produced draft decisions in stilted language. When I have asked them why they write like this when they do not speak that way, the reply was that the judge with whom they previously worked wanted it like this. As Goethe's Mephisto put it so aptly in *Faust*: "All rights and laws are still transmitted like an eternal sickness."

The self-perception of judges can be seen not only in the way they conduct themselves in their work in court. The office of judge does not stop on leaving the court building. The Austrian Law on Judges and Prosecutors (*Richter- und Staatsanwaltschaftsdienstgesetz*) prescribes that judges and prosecutors, serving and retired, must conduct themselves in such a way that confidence in the administration of justice and the reputation of their professions are not compromised. This

calls for equidistance to be kept to all political parties. This is expressly set out in the Declaration of Ethics of the Association of Austrian Judges (*Ethikerklärung der Vereinigung der österreichischen Richterinnen und Richter*): “We are convinced that joining a political party or party-political activities by a judge can damage the credibility of an independent judiciary, which cannot be influenced by party-political interests and is not attached to interest groups”.

Judges must also consider very carefully if and how they express themselves on social media such as Twitter. They open the door for a challenge if – as occurred in connection with a high-profile criminal prosecution in Vienna against, among others, a former minister – they make very pointed remarks against an accused. The challenge against the President of the competent criminal chamber – the wife of the tweeting judge – was unsuccessful, but left an unpleasant aftertaste.

3 Selection Process and Career Progression

Austria has a system of career judges. After finishing law studies and completing a (due to cutbacks henceforth only) 5-month clerkship at court, it is possible to apply to join the judicial preparatory service. Other conditions for appointment to the post of candidate judge are Austrian citizenship, full capacity to act and full personal and professional aptitude, including the social skills necessary for performing the functions connected with the exercise of judicial office. It is rigorously tested whether someone meets the personal and professional aptitude requirements.

This has not always been the case. In the decades immediately following the war it was at least no disadvantage to have a close relative in the judiciary. Following some very negative experiences with judges who were not up to the job, a new system was introduced and efforts are now made to assess on the basis of objective criteria whether someone meets the personal and professional standards.

This is relatively simple to ascertain in the case of professional standards. There are courses which candidates must attend and they are assigned to judges that train them (*Ausbildungsrichter*) and for whom they draft orders and judgments, so that, like the course leaders, the judges are able to assess the professional aptitude of the candidates. In addition, there is an examination in, at least, civil and criminal law which must be taken by candidates.

It is more difficult with regard to the personal requirements. Candidates must undergo a psychological aptitude test conducted by an independent psychologist. For some time, the outcome of this test was given much greater weight than the outcome of the specialist knowledge test. This did not last long either and the emphasis shifted once again, such that the important factor is now how candidates perform in the admission test.

This substantially improved opportunities for women to join the judicial preparatory service, as highly qualified women tend to opt for the office of judge rather than the profession of lawyer, whereas men with very high academic achievements more often aspire to a career at one of the big law firms. There have been female judges

in Austria only since 1947. After the first two female judges were appointed, progress was very slow. Networks, whether formed through family relationships or through common sports activities, opened the way for many men. In addition, there were reservations that women were too guided by emotions to be able to take impartial and objective decisions. In any event, that was a subject of discussion at the “Female jurists in the judiciary” conference which took place in 1968 and at which it was conceded that women might at least be suitable as family court judges.

It is not surprising, therefore, that in my home state of Styria it took almost another 25 years before it was decided to admit a woman to the judicial preparatory service. When I was appointed to the Austrian Supreme Court in 1993, I was the third woman there and in 2007, I became the first female President of the Supreme Court. More than 20% of the members of the Supreme Court are now women; throughout the judiciary that figure is higher than 50% and in the judicial preparatory service around 80%.

Accordingly, the office of judge is one of those professions where there will be more women than men in future. This creates a risk that judicial office will be held in lower regard, as is now the case in professions performed principally by women, such as teaching. There is still a need for awareness to be raised in society, above all, of the importance of personal and professional aptitude for this responsible profession and of the fact that gender has no bearing on aptitude.

Those who are successfully admitted to the judicial preparatory service can generally presume to make the leap into judicial office. Although it is necessary to pass the judge’s examination, the failure rate for the examination is low. It is also possible, however, to apply to the court as a lateral entrant. Someone who has completed training as a lawyer and passed the bar examination can, after a supplementary examination, join the judicial preparatory service. When I was appointed as a judge in 1979, it was still possible to switch directly from being a lawyer to a judge. I was neither required to pass through the judicial preparatory service nor was a supplementary examination necessary. This brought not only advantages. As a colleague put it at the time, I was really thrown in at the deep end and had to show that I could swim.

Whilst the judicial authorities alone decide on admissions to the judicial preparatory service, appointments to permanent judge’s posts require a proposal from the responsible personnel panel. Personnel panels are set up at courts and are composed of *ex officio* members (President and First Vice-President of the court in question) and members elected by the judges at the court in question. Personnel panels have wide-ranging powers. In addition to proposals for appointments, the personnel panel decides on the assignment of business and determines how cases are allocated among members of the court. Personnel panels are also required to decide whether cases are removed from judges if – for whatever reason – they are unable to process them within a reasonable period. Such cases are distributed among the other judges, who have to deal with them in addition to their own case-files. It is therefore understandable that an important factor in selecting and ranking candidates is whether it is believed they are capable of coping with pressure, as it is also in the interest of their future colleagues that they are able to do so.

Ultimately, it is the Minister for Justice who decides who is appointed, in agreement with the Federal President in the case of more senior posts. Proposals for appointments must include twice as many candidates as the vacancies to be filled. Candidates are ranked according to suitability. Inclusion in the proposal and the ranking must be substantiated. It is standard practice that no one is appointed unless they appear in a proposal. The Minister for Justice is not bound by the ranking. A proposal from the personnel panel is not envisaged for two judicial positions: the President of the Supreme Court and the two Vice-Presidents. The Federal President appoints the President and Vice-Presidents on a proposal from the Minister for Justice alone.

This was met with fierce criticism from the Association of Austrian Judges. For years it has made efforts to have a Council of the Judiciary established in Austria to appoint judges and decide on their careers without political influence. In any case, however, it wishes for the personnel panel or a body with similar composition to participate in the appointment of the President and the Vice-Presidents of the Supreme Court. Thus far its efforts have been in vain. This is not surprising if it is borne in mind that any participation by judicial bodies and, to an even greater degree, a Council of the Judiciary limits the opportunities of politicians to have an influence on appointments to key posts in the judiciary.

Regardless of who ultimately decides if someone is appointed as a judge, it is no easy task to assess suitability for the office of judge. To be a good judge, excellent legal knowledge alone is not enough. Judicial office calls for more.

For me, the ability to empathise with others is paramount, whether it be the parties or witnesses. Judges must bear in mind that witnesses may be intimidated by an environment, which is often unfamiliar to them. The feeling of insecurity is further heightened if – as sadly often occurs – questions are asked in a harsh tone. Such a style of questioning often gives the impression that witnesses are not believed. This also reduces the prospect of really establishing the truth, which is difficult in any case with witness statements. To have to find out what really happened years after an event was often a bigger challenge for me than the legal assessment of the established facts. Anyone can see for themselves how deceptive the memory can be. As a young judge I repeatedly tested my memory because I was astonished how precisely witnesses believed, after a long period of time, they were able to recall, in a traffic accident for example, who approached an intersection first. Despite these reservations vis-à-vis certain evidence, however, there is no other way to ascertain what really happened and, unless the true facts are established, the decision cannot be correct or just.

In striving for a just decision, it can also be useful to endeavour to see the matter through the eyes of the parties, as this may help to ensure that the case is not viewed solely from a juridical perspective, but that a balanced, realistic decision is taken. Equally important for me is the ability to understand and to make oneself understood. Both empathy and language competence are qualities that, unlike legal knowledge, cannot be simply determined by a test.

Much emphasis is therefore placed in the selection procedure on the assessment of candidates by the judges who train them. Those judges must also assess character

and should be in a position to do so after they have often worked with candidates for several months. Nevertheless, some assessments must be seen in context because they are heavily influenced by the character of the assessor himself. It is and remains a difficult and highly responsible undertaking to select suitable individuals for judicial office.

It is an easier task to establish qualities which clearly preclude suitability for judicial office. These include above all weaknesses in decision-making and a lack of ability for self-organisation, as anyone who wishes to do justice to their role as a judge must be able to organise their work and to operate methodically, and cannot shy from taking decisions. Even though those responsible for selection are well aware of this, it cannot be ruled out that it will subsequently emerge that some candidates were selected who are not up to the job. This may lead to situations that are difficult in human terms where a disciplinary procedure or, if someone cannot manage their work for health reasons, service court proceedings have to be instituted. Nevertheless, it would be irresponsible if the superior service authority made concessions at the expense of litigants in such cases.

4 The Judiciary as the Third State Power

The separation of powers is an essential element of any modern constitutional democracy. The distribution of the three State powers – legislative, executive and judiciary – among different institutions is intended to prevent concentration of power and abuse of power. Power corrupts; and absolute power, corrupts completely. The reciprocal controls on the three State powers, a system of checks and balances, ultimately seek to ensure that the State's power receives democratic legitimisation and is exercised in the public interest.

The judiciary has particular importance in this regard as it is the courts that review whether laws are duly enforced and the rights of individuals safeguarded, both in relation to the State – Austria has only had a single appellate system in administrative proceedings since 2014 when the Federal Administrative Court, the Federal Finance Court and the nine Regional Administrative Courts were established – and in relations between citizens. The courts can perform their review function only if judges are truly independent.

In the perception of the public, judicial independence is not properly appreciated. This can be seen in the reactions to decisions which appear, in essence, to run counter to purported overriding interests or a “natural sense of justice.” One example of the former is the 2017 decision taken by the Federal Administrative Court by which approval for a third runway at Vienna International Airport was refused on grounds of environmental protection. Even though the judges gave a comprehensive statement of grounds for their decision and the decision was not final, but could be challenged in the Constitutional Court and in the Supreme Administrative Court, criticism and rejection were such that criminal charges for abuse of authority were brought against two of the three judges. Subsequently, the Constitutional Court set

aside the decision of the Federal Administrative Court. That was not sufficient reassurance and the Government parties demanded that economic growth be included in the constitution as a “State objective” (*Staatsziel*). The public debate ignored the fact that economic growth cannot be an objective in itself, but only a means of achieving something else, as a State objective of economic growth does not specify the purpose for which the economy should grow and what secondary effects will be tolerated.

Another example, indeed almost a textbook example, of the lack of understanding of judicial independence is the sentences given to sex offenders. Often there is criticism that punishments are too lenient and calls for the range of punishments to be increased. It is ignored that the punishment must be commensurate with the degree of fault. It cannot therefore be assessed on the basis of the offence alone whether the punishment imposed on the offender was too lenient.

The call to the legislature is sounded whenever court decisions are met with incomprehension. One frequent cause is abbreviated, if not completely distorted, reporting in the media. This begs the question whether in sensitive areas courts are able simply to publish a judgment or whether it would be appropriate to explain its content more precisely. There was probably a need for this a few years ago when the Supreme Court ruled that a doctor was responsible for full alimony for a child because he had failed to detect the child’s disability in a prenatal examination. The decision became known in Austria under the catchphrase “child as damage.” This catchy shorthand stuck with the decision and shaped the discussion. No attention was paid to the fact that the Supreme Court had sought to explain that it was not the child that should be regarded as the damage, but the financial burden on the parents. A detailed explanation was also given as to the cause of liability, the breach of duties under the medical treatment contract. The abbreviated account in media reports, which virtually invited rejection, could perhaps have been avoided if a short, concise summary of the main grounds had been given.

I take a critical view, on the other hand, if courts feel the need to justify their decision retrospectively. The court speaks through the judgment; it must, however, employ language that is understood. By the decision the matter is closed as far as the court is concerned. If the decision is criticised, the court can learn lessons for future cases, whether it be that the legal opinion cannot be maintained or that it must be supported by a better statement of grounds.

The decision must in any case make clear the considerations on the basis of which the court reached the decision. It must undoubtedly also be apparent that the court respects the binding force of the law, as it is self-evident that the courts are bound by the law. It is so self-evident that the Constitution does not expressly mention the binding force of the law for the courts. In Article 18(1) of the Federal Constitutional Law (*Bundes-Verfassungsgesetz*) the principle of legality is expressly laid down (only) for “the entire public administration.” There is absolutely no doubt, however, that the courts are bound by the law.

Express provision is made for the separation of the judiciary and the administration. Under Article 94(1) of the Federal Constitutional Law, the judiciary is separate from the administration at all levels of proceedings. This means that a State

institution cannot be both a court and an administrative authority. It also means that there can be recourse against a decision of an administrative authority to an ordinary court only in exceptional cases. In this case we speak of “successive jurisdiction;” when an action is brought before a court against, for example, a decision by an insurer such as a pension insurance institution, the decision ceases to be in force and the court is required to assess and decide on the case irrespective of it.

The separation of powers has not been put into effect with regard to public prosecutor’s offices. The Minister for Justice, a member of the second State power, the executive, still heads the public prosecutor’s office, even though public prosecutors have been expressly enshrined in the Federal Constitution as organs of the ordinary judiciary since 2008. As an organ of the ordinary judiciary that is bound by instructions – an inherent contradiction – they are thus very different from judges, whose independence (in the exercise of judicial office) is established in Article 87(1) of the Federal Constitutional Law. It is also provided in Article 88 of the Federal Constitutional Law that judges may not be transferred or removed from office without their consent, except on reaching the age limit or based on a decision in disciplinary or service court proceedings.

Since 2016, there has been an Advisory Board for Ministerial Direction at the General Procurator’s Office, which is the public prosecutor’s office at the Supreme Court. This three-person body is chaired by the General Procurator. The Advisory Board is required to advise the Minister for Justice in cases where criminal charges are brought against high-ranking executive organs, such as the Federal President and Federal Ministers, or members of the Constitutional Court, of the Supreme Court and of the General Procurator’s Office, or where the Minister for Justice considers it necessary because of exceptional public interest in a criminal case or for reasons of partiality.

The Advisory Board is not at the top of the chain of command but merely advises the Minister for Justice. The Minister for Justice is free to decide whether to follow the Advisory Board’s recommendations. The establishment of the Advisory Board does not therefore alter the fact that in sensitive criminal cases a member of the Government still has the final word whether investigations are dropped or charges are brought. This has been a repeated subject of criticism. The critics did include the former Minister for Justice, who had worked as a professor of criminal law and a defence lawyer before taking up his post in Government. After joining the Government he changed his view and rejected demands for an independent chief public prosecutor.

Demands have been made repeatedly, and are still being raised, for Parliament to appoint a chief public prosecutor to serve for a limited term which may not be extended. An independent chief public prosecutor would be much less liable than a member of the Government to be suspected of representing the interests of Government or of a political party. This is important above all in criminal cases where there are political links or connections with a political party.

There is little interest among the public in the debate regarding an independent chief public prosecutor, which is further evidence of the low level of understanding

for the value of the independence of the judiciary and in particular of criminal prosecution.

5 Concluding Remarks

Justice, alongside wisdom, temperance and courage, is one of the four cardinal virtues. It is more difficult, or at least no easier, with justice than with wisdom, temperance or courage, to agree what it means for a specific case. This will always be a subjective assessment; personal experiences and impressions are brought to bear along with the objective circumstances. It is also relevant how the decision has been reached. If judges are perceived as being genuinely independent and conduct proceedings fairly, then their decision will be felt to be more just than in cases where doubts over independence and impartiality cannot be dispelled at least *a priori* as completely unfounded. It is therefore crucial to the assessment of a decision to be considered just, whether the judiciary as a whole is viewed as independent and, above all, free from party-political influences.

Because of the interaction between objective circumstances and subjective assessment there are a number of question marks over the appraisal of a court decision as “just”. But this cannot and must not mean that justice plays no role in the exercise of judicial office. To decide justly, and to do justice to the idea of the law, must be the impetus and the guiding principle, as the law is dependent on acceptance of the public as it is manifested by being applied in court proceedings. Only on this basis can it actually fulfil its function of ensuring peaceful human coexistence despite all the differences that exist.

The perception and acceptance of the law as a reasonable means of ordering our life together thus depends crucially on whether judges do justice to their responsibility, meaning that they must strive to take just decisions, as that expectation is inseparably linked to judicial office. Judges should see themselves not only as servants of the law, but also as servants of justice, and they must also seek to live that out in their day-to-day work.

The EU Judiciary in a New Era of Accountability



Marc Jaeger

1 Introduction

One of the major concerns that have guided Carl Baudenbacher throughout his career, as a professor and as a judge, has been to root justice in social and economic reality and, therefore, to appreciate the results attained by a court against the expectations and needs to which that court is due to respond. This concern has been source of inspiration for this essay.

In a context of rising demand for transparency from public institutions, along with technological developments and the fast spread of information, EU courts are increasingly expected both to account for their activity and to strengthen their efficiency. The development in Europe of mechanisms that implement judicial accountability calls to reflect on how this phenomenon can contribute to the quality, efficiency and independence of justice and on how the EU judiciary can benefit from it. The first part of this essay presents an overview of the development of management of justice in Europe. The second part provides a glimpse of the specific features of the EU judiciary and of their interaction with accountability mechanisms. The third part explores the components of an effective justice system and the extent to which the indicators currently used for evaluating judges and courts reflect these objectives. The fourth part is a reflection on the actors responsible for the conception and implementation of accountability mechanisms with regard to EU courts. Ultimately, this contribution aims at raising attention to the need of pursuing the wide array of expectations that exist in relation to EU courts, which include efficiency but are not limited to it. The fulfilment of these expectations was at the origin of EU judiciary's legitimacy, and authority and is still crucial to maintain them.

President of the General Court of the European Union.

M. Jaeger (✉)

General Court of the European Union, Luxembourg City, Luxembourg

2 Context: On a New Management Approach in National and EU Judiciaries

Efficiency of court proceedings has been receiving greater attention within European countries since the right to a fair trial was included in several international instruments.¹ The requirement of reasonable length of proceedings, enshrined in these instruments as a constitutive part of a fair trial, began to be subject to judicial scrutiny and was progressively translated into detailed standards with which courts were expected to comply.² More recently, since the 1990s, a new trend has been spreading throughout Europe towards the application of management principles to judicial systems. This trend can be connected to a much broader need of the public for efficiency and quality of public services and, as a consequence, to the increasing application of management principles to the public administration, known as “New Public Management.” A management approach to justice implies applying a set of standards and benchmarks to the whole process leading to judicial decisions. Evaluation criteria that were initially introduced focussed on human, budgetary and other material resources at the disposal of the courts; their workload and backlog levels; individual and global performance over a given period of time; the average length of proceedings; the services provided to parties and citizens, including informatics access systems; and the overall (declared) satisfaction of citizens.³

Thus, in a growing number of EU Member States, legislation has been adopted aiming at strengthening the efficiency of justice. Performance management systems were increasingly employed to assess the output of courts and their working methods and annual reporting based on quantitative indicators and efficiency-based methods of reward were introduced in the judicial organisation of several Member States; this often required a restructuring of courts and the involvement of new actors in their control.⁴ Mechanisms aimed at monitoring efficiency were also

¹ See Article 6 of the European Convention on Human Rights and Fundamental Freedoms (1950) and Article 9 of the International Covenant on Civil and Political rights (1966). See also Article 7 of the American Convention on Human Rights (1969) and Article 7 of the African Charter on Human and Peoples’ Rights (1981).

² See, for instance, Council of Europe (2001, 2006) *The right to a fair trial. A guide to the implementation of Article 6 of the European Convention on Human Rights*, Human rights handbooks 3. Available via Council of Europe. <https://rm.coe.int/168007ff49>. Accessed 23 April 2018. See also Council of Europe (2017) *Guide on Article 6 of the European Convention on Human Rights*. Available via European Court of Human Rights. https://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf. Accessed 23 April 2018.

³ See, for instance, CEPEJ (2007) *Monitoring and evaluation of court system: A comparative study* (European Commission for the Efficiency of Justice). Available via Council of Europe. https://www.coe.int/t/dghl/cooperation/cepej/series/Etudes6Suivi_en.pdf. Accessed 23 April 2018. See also Severin (2010), pp. 37–54.

⁴ On the development of performance based systems of accountability in Europe, see, for instance, CEPEJ (2007). See above, note 3. See also ENCJ Working Group on Quality Management (2008). *Final Report*. Available via ENCJ. <https://www.encj.eu/images/stories/pdf/workinggroups/>

introduced with regard to the European Court of Human Rights: “results based budgeting” is applied since 2004 alongside the annual setting of expected results and performance indicators.⁵

It was in the same spirit – of improving the functioning of national justice systems through the monitoring of performance indicators – that, in 2002, the Committee of Ministers of the Council of Europe established the European Commission for the Efficiency of Justice (“CEPEJ”). Through its biannual judicial evaluation reports, the CEPEJ has been highlighting organizational reforms, practices and innovations introduced at the national level.⁶ The research carried out by the CEPEJ through the years served as a basis for the development of a major institutional instrument for the evaluation of judicial systems in the EU context: the EU Justice Scoreboard. Launched in 2013, the Justice Scoreboard provides an annual comparative overview of the independence, quality and efficiency of national judicial systems.⁷ Worth mentioning is also the activity of the Working Group on Quality Management, established by the European Network on Councils for the Judiciary (“ENCJ”). Since 2007, the ENCJ has issued biannual reports containing an overview of the reforms undertaken by the national judicial systems and the role of the councils for the judiciary and court administrations in promoting quality management.⁸ The reports prepared and published so far within these three institutional frameworks show a development of evaluation criteria from being related only to efficiency – in particular, to the use of financial resources, the length of proceedings and quantitative output – to refer also to the quality and independence of justice systems.

This trend towards an increased demand for efficiency and accountability has also concerned the EU judiciary, which has been subject to greater scrutiny by the public, the media, and, ultimately, by other organs of the European Union, and expected to introduce methods of performance assessment and control. EU courts have taken several steps towards this direction; actually, efficiency has inspired all the major

[reportqm20072008.pdf](#). Accessed 23 April 2018.

⁵See Council of Europe (October 2004) *Draft Budget for 2005*, Volume I, v-vii. Available via Council of Europe. <https://rm.coe.int/16804bd900>. Accessed 23 April 2018. See also Lambert-Abdelgawad (2016), p. 819.

⁶See, for instance, the biannual report concerning the 2014–2016 evaluation cycle: Council of Europe (2016) European judicial systems. Efficiency and quality of justice, CEPEJ Studies. Edition 2016, available via Council of Europe. <https://www.coe.int/t/dghl/cooperation/cepej/evaluation/2016/publication/CEPEJ%20Study%2023%20report%20EN%20web.pdf>. Accessed 23 April 2018.

⁷See, for instance, European Commission (2018) The 2017 EU Justice Scoreboard. Available via the European Commission. https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2017_en.pdf. Accessed 23 April 2018. See also the Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions. *The EU Justice Scoreboard: A tool to promote effective justice and growth* (COM/2013/0160 final), paragraph 2.

⁸See, for instance, ENCJ (2017) *Report on independence, accountability and quality of the judiciary. Performance indicators 2017*. Available via ENCJ. <http://njb.nl/Uploads/2017/6/encj-report-ia-2017-adopted-ga.pdf>. Accessed 23 April 2018.

internal reforms. As far as the General Court is concerned, its very creation in 1989, with the name of Court of First Instance (“CFI”), was meant to enable the Court of Justice to focus on ensuring uniform interpretation of Community law, and making sure that cases requiring extensive factual and technical analysis are dealt with in a timely manner.⁹ Besides, the possibility to allocate cases to a single judge, although it turned out not to be widely used, was introduced in 1999 with a view to enabling the CFI to cope with its increased workload by exhausting all the possibilities of improving its working efficiency as it was composed at the time.¹⁰ Efficiency was also a major motive of the regular adaptation to technological progress, such as the introduction of the e-Curia application in 2011, which “allow[ed] the lodging and service of procedural documents by electronic means.”¹¹ Also, increasingly comprehensive annual reports containing statistics about the judicial activity of EU courts and the functioning of the institution have been established since 1997. It is also worth mentioning that, back in 2002, in the report by the Working Party on the future of the European Communities’ court system, composed for the most part of former Court of Justice of the EU’s members (“CJEU”), workload backlog and the need of procedural and structural reforms with a view to a shortening of the length of proceedings were identified as the major challenges that the jurisdiction had to face in the coming years.¹²

Increasing efficiency has continued to represent the major drive for EU judiciary’s reforms until today. This is the case, particularly, with regard to the latest revision of the Rules of Procedure of the two Courts.¹³ The revised Rules of the General Court adopted in 2015 include measures aiming at shrinking the number of steps within the entire procedure, at accelerating the decision making process and at limiting delaying attempts and unnecessary complexity in procedures.¹⁴ Moreover, the

⁹ See Jaeger (2009), p. 2.

¹⁰ See Collins (2009), pp. 77–92.

¹¹ See the preamble of the Decision of the General Court of 14 September 2011 on the lodging and service of procedural documents by means of e-Curia. OJ 2011. C289, p. 7.

¹² European Commission (January 2000) *Report of the Working Party on the future of the European Communities’ court system*. Available via European Commission. http://ec.europa.eu/dgs/legal_service/pdf/du_e_en.pdf. Accessed 23 April 2018.

¹³ See the Rules of Procedure of the Court of Justice, OJ L 265, 29.9.2012, pp. 1–42, in particular (6) of the Preamble and the Rules of Procedure of the General Court, OJ L 105, 23.4.2015, pp. 1–66, in particular (3)–(8) of the Preamble.

¹⁴ For instance, first, the new Rules foresee a more proactive role of the presidents of chambers: for example, according to Article 83(3), when it is not decided that a second round of pleadings is unnecessary, the president of the chamber may specify to the parties “the matter to which the reply or the rejoinder should relate.” Second, the number of cases where a procedural issue can be decided upon by simple decision instead of a reasoned order has increased. Third, the revised rules of procedure remove the possibility to intervene orally after the 6 weeks period starting from the publication in the Official Journal of the European Union of the notice indicating, *inter alia*, the lodging of an application initiating proceedings. Fourth, according to Article 181, proceedings in matters of intellectual property include now one single round of pleadings, removing the usual second round of written exchange between the parties. Fifth, the range of cases allowing (according to Article 29) delegation of a case to a single judge was widened, and includes now proceedings

reform of the EU judicial architecture that was approved in 2015, and will be completed within 2019, followed a further increase in workload and is aimed in great part at reducing the backlog of pending cases and engendering a positive impact on the length of proceedings.¹⁵ Indeed, successive enlargements of the European Union, the extension of the European Union's powers and the intensification and diversification of legislative and regulatory activity had an impact on the composition of the CJEU, on its competence and workload. Eventually, with Regulation (EU) No 2015/2422, on the basis of a proposal of the CJEU, the Parliament and the Council amended the Statute of the CJEU to progressively double the number of judges of the General Court by 2019. It is also to mention that, in 2017, the General Court ruled that the duration of four proceedings before the General Court itself had exceeded a reasonable length.¹⁶

Finally, the Court of Justice and the General Court have also taken many steps in order to assess and monitor their performance across quantitative parameters.¹⁷ These measures, along with all the other changes in procedure and working methods, have been successful in reducing the time taken to process cases. Thus, the average processing time of a case before the Court of Justice was 19.6 months in 2006 and 14.7 months in 2016, whereas, before the General Court, this period was 25.8 in 2006 and 18.7 months in 2016. The Court of Auditors recently recognised the results achieved by EU courts in maintaining and strengthening efficiency.¹⁸

in matter of intellectual property. Sixth, the revised Rules of Procedure led to a simplification of the default procedure. Indeed, unlike former Article 122, Article 123 of the revised text no longer envisages the possibility of holding a hearing in this procedure; moreover, it does not allow for any preparatory enquiry. Seventh, new Article 106 allows the General Court to rule without an oral part of the procedure in direct actions if none of the main parties has requested a hearing. Last, Article 224, read jointly with the practice rules adopted by the General Court for the implementation of the Rules, puts limits to the length of pleadings, with the effect of, one hand, to spare time and resources in translation and, on the other, leading the parties, and allowing the judge, to focus on the most relevant points of each case. See Jaeger (2017), pp. 26–28.

¹⁵ See the recitals to Regulation (EU) No 2015/2422, in particular recital No (5).

¹⁶ In these judgments, currently under appeal, the General Court ordered the European Union to compensate the applicants for the damage they had sustained because of the infringement of the obligation to adjudicate within a reasonable time. See General Court judgments of 10 January 2017 in case T-577/14 *Gascogne Sack Deutschland and Gascogne v European Union*, EU:T:2017:1, of 1 February 2017 in case T-479/14, *Kendrion v European Union*, EU:T:2017:48 and T-725/14, *Aalberts Industries v European Union*, EU:T:2017:47, of 17 February 2017 in case T-40/15, *ASPLA and Armando Álvarez v European Union*, EU:T:2017:105, and of 7 June 2017 in case T-673/15, *Guardian Europe v European Union*, EU:T:2017:377.

¹⁷ See below, Sect. 4.

¹⁸ European Court of Auditors (2017) Performance review of case management at the Court of Justice of the European Union. Available via European Court of Auditors. https://www.eca.europa.eu/Lists/ECADocuments/SR17_14/SR_CJEU_EN.pdf. Accessed 23 April, p. 90.

3 Specific Features of the EU Judiciary: What Impact on Accountability Mechanisms?

When evaluating the activity of EU courts, mechanisms that have been developed, on one hand, with regard to national courts, on the other, to other public institutions, must be adapted to the peculiar features that define the EU judiciary. First, the status of EU Judges and Advocates General must be considered. According to Article 253 of the Treaty on the Functioning of the European Union (“TFEU”), they shall be appointed by common accord of the governments of the Member States for a term of 6 years and can be reappointed. Unlike in several Member States, EU Judges and Advocates General are not supposed to conduct their all career within the CJEU; reappointment is possible, upon decision by common accord of the governments of the Member States. As it is the case for the other EU institutions, no internal organ of the CJEU can influence the career advancement or the reappointment of its members, neither based on performance, nor on any other grounds.¹⁹

Second, EU courts operate under the principle of collegiality. Thus, within each court, all judges can participate in the decision making process related to each case. For instance, in both courts, the reporting judge prepares a preliminary report. This report contains, as concerns the Court of Justice, proposals regarding the progress of the procedure – for instance, concerning measures of inquiry and on whether there should be an oral part of the procedure and whether an opinion of the Advocate General should be delivered – and about the formation to which the case should be assigned. As concerns the General Court, the preliminary report also contains an analysis of the relevant issues of fact and of law raised by the action.²⁰ The preliminary report is shared with all other Judges and Advocates Generals, as concerns the Court of Justice, and with the members of the chamber, as concerns the General Court, who will then be able to take stand with regard to the position taken by the reporting judge.²¹ In a multinational context, where all members of the courts bring their national legal tradition with them, the principle of collegiality contributes to the legitimacy and the authority of the case-law.

Besides, the secrecy of the deliberations, enshrined in Articles 35 and 53 of Protocol N°3 on the Statute of the CJEU and applicable both to the Court of Justice and the General Court, implies that the individual positions of judges are not disclosed in any way.

Moreover, the peculiar role played by multilingualism in proceedings before EU courts must be recalled. The legal bases for EU multilingualism are to be found in

¹⁹ On the relevance of the rules on the appointment of judges of supranational courts, see Baudenbacher (2008), pp. 171–172. See also Baudenbacher (2016), pp. 140–141.

²⁰ See Article 59 of the Rules of Procedure of the Court of Justice and Article 87 of the Rules of Procedure of the General Court.

²¹ As recalled above, although cases before the General Court may be decided upon by a single judge under the conditions laid down in Article 29 of the Rules of Procedure of the General Court, single judge decisions have so far represented an exception in General Court’s adjudication. See above, Sect. 1. See also note 14.

Article 342 TFEU, and in Council Regulation No 1/1958. According to these instruments, read jointly with the Statute of the CJEU and, respectively, Article 36 of the Rules of Procedure of the Court of Justice and Article 44 of the Rules of Procedure of the General Court, each of the 24 official languages of the European Union can be the language of the case. This means that all oral and written submissions should be lodged in that language and that, when a document is allowed to be filed in another language in certain specific circumstances, a translation into the language of the case should be provided. On the other hand, the Court needs a common language in which to conduct deliberations. Therefore, all documents lodged by the parties in the language of the case are translated into the working language as part of the internal working file and draft judgments are prepared in the working language. Before delivery of the judgment, a translation from the working language into the language of the case must be ensured. Besides, a major part of the case-law of both the Court of Justice and the General Court is translated into all official languages of the EU, as they are published in the European Court Reports, which appear in all official languages.²² The language arrangements just described are unique: the language service of the CJEU must assure 552 language combinations. The time and resources that need to be invested in translation by the CJEU could, at first sight, appear considerable. However, first, the actual impact of translation is limited as compared to the overall duration of proceedings.²³ Second, the requirement of multilingualism for ensuring a true access to justice, legal certainty and, ultimately, legitimacy of EU courts can hardly be measured in quantitative matters.

Finally, the wide variety of cases that EU courts must deal with, and of functions they are called to fulfil, must be considered. Successive enlargements of the European Union, the extension of its competence and the intensification and diversification of legislative and regulatory activity had as an effect that EU courts must judge upon an extremely wide array of issues. The CJEU is a *sui generis* supranational court, which deals with administrative, constitutional and international issues. Indeed, it carries out very diverse functions: it delivers preliminary rulings on questions raised by national courts; decides on disputes between EU institutions and between EU institutions and Member States; delivers opinions as to whether an agreement between the Union and third countries or international organisations is compatible with the Treaties; and it reviews the legality of acts of EU institutions and other EU organs in proceedings initiated by private parties. The complexity, importance and workload pertaining to the different cases brought before EU courts,

²² For the year 2017, 801 out of 1249 (representing the 64.1%) judgments, opinions of advocates-general and opinions delivered on the grounds of Article 218 TFEU by the Court of Justice and the General Court were published in the Reports of the CJEU in all EU official languages. The proportion is higher with regard to the Court of Justice and lower with regard to the General Court, as the latter implements a stricter selective publication policy.

²³ The limited impact of translation on the overall timeline of proceedings was recognized by the Court of Auditors in its Performance review of case management at the Court of Justice of the European Union, paragraph 74. See above, note 18.

therefore, may vary substantially. In view of such diversity, specific benchmarks for each type of case need to be defined.

These features are not accessory elements of the EU judiciary; rather, they constitute its very essence. Each evaluation method applied in this context must therefore be conceived after these peculiar elements, and each decision concerning the mechanisms of control applied to EU courts and the actors entrusted with their implementation must consider their unique nature.

4 Reference Values: What Should EU Courts Account For?

The concept of accountability refers to a social relationship in which an actor has to justify its actions to an organ or group of persons, towards a set of values, and may face consequences. Applied to public administration, accountability mechanisms can bring relevant gains. First, they make an institution answer for the respect of a set of rules and procedures and this prevents unfairness and abuse of power. Second, they allow citizens and tax payers to be informed about the functioning of the institution. Third, they make an institution answer for its concrete results. With regard to judicial functions, accountability cannot obviously imply for judges to face immediate consequences for the content of their decisions: this would contravene the very essence of their independence. However, accountability may still be applied to the functioning of the judicial system as a whole. Thus, information, evaluation and monitoring mechanisms can refer to the principles and objectives on which the judicial system is based and to the guarantees set to ensure that courts function consistently with those principles and objectives, to the quality and timeliness of the service provided to the public, and to the use of financial and human resources.²⁴

Certainly, the objectives set for accountability methods are inextricably linked to what objectives are set for justice and, ultimately, to the needs and expectations that exist in relation to a specific judicial system. To start with, the elements constituting the **quality of justice** in proper terms must be considered. The first element that is expected from a judicial system is that it delivers *fair decisions*. This first element of quality cannot be subject to other scrutiny than by the courts themselves. The quality of judgments can be measured by their legality, logical consistency and by the clarity of the reasoning. The proportionality of the chosen solution is also important, particularly with regard to disputes concerning fundamental rights and freedoms. *Legal certainty* is also a key element of quality. Foreseeability of decisions can be assessed through the level of consistency of the case-law and through an analysis of how judicial reversals are carefully examined, reasoned and, possibly, their surprise effect contained. These aspects should, first of all, be assessed by the courts themselves. However, legal certainty can be measured also through an assessment of the easiness for the public to get knowledge of the case-law, including, when necessary, in different language versions. *Access to justice* represents another

²⁴ See Bovens (2007), pp. 447–468; Contini and Mohr (2008), pp. 27–31.

essential element of the quality of justice. Beyond the right to an effective remedy as enshrined in many national, European and international instruments, access to justice involves other, more easily measurable, aspects, concerning the availability of legal aid, good communication with the parties as well as electronic access to justice. Finally, *procedural guarantees* represent an essential pillar of quality. The existence of mechanisms able to ensure the rights of defence and equality of arms among the parties are guarantees for constructive debate and a proper solution of conflicts.

Independence – understood as absence of improper influence from the legislature and the executive with a view to ensuring the impartiality of judges – is another fundamental element of an effective judicial system. Thus, indicators for independence can be related to the procedures and actors involved in the appointment and dismissal of judges, in the length of judges' terms of office, in the allocation of financial resources to courts and in the allocation of cases within a court.

Last, but not least, an effective judicial system is **efficient**. Human, budgetary and other material resources at disposal of the courts must be used in an efficient manner. The most common indicators in this context assess the workload and backlog levels; individual and global performance over a given period of time; the average length of proceedings; the service provided to parties and citizens, including informatics access systems; and the overall (declared) satisfaction of citizens.²⁵

All these aspects represent each one stage in the development of the thinking about what a good judicial system is and what it is for. The perception of how to best reconcile these elements may change throughout time, but they certainly all contribute to attain an effective judicial system.²⁶

The comparative analysis conducted by the EU Commission, through the Justice Scoreboard, and by the CEPEJ, through its biannual report on the Quality of Justice, reflect this wide array of values. As it emerges from these instruments, accountability mechanisms now implemented in EU Member States cover standards related to quality of justice and independence alongside efficiency.²⁷ EU Courts also measure their activity across a broad set of parameters. Each year, the Annual Report provides information concerning not only the use of resources and case management, but also, for instance, the functioning of the Court of Justice and the General Court; communication with national courts, the parties and the public; accessibility of case law, through the internet and in all EU official languages; and about availability of interpretation during the hearings.²⁸

Furthermore, both EU courts have developed monitoring instruments allowing for cases to be followed on an individual basis by the registries, the judges, the

²⁵ See, for instance, CEPEJ (2007) Monitoring and evaluation of court system: A comparative study. See above, note 3. See also Severin (2010).

²⁶ See Sauvé (2016), p. 667.

²⁷ See, for instance, European Commission (2018) *The 2017 EU Justice Scoreboard*, particularly at 31. See above, note 7.

²⁸ See Court of Justice of the European Union (2018) 2017 Annual Report – The year in review. Available via Curia. https://curia.europa.eu/jcms/jcms/Jo2_7000/en/. Accessed 23 April 2018.

presidents of chambers and the presidents of each jurisdiction. Both courts also have internal statistics allowing to analyse the duration of the different stages of the procedure by type of action or by subject. The introduction of these monitoring instruments marks an important step towards a high-quality EU justice: transparency on the allocation and use of resources, combined with efficiency in employing them are crucial factors of legitimacy of courts today.²⁹ In addition, it is an obligation for the CJEU, as for all EU institutions, to use the available resources according to the principle of sound financial management.³⁰

However, the effectiveness and legitimacy of the EU judiciary depend on its capacity to reconcile efficiency with the other essential expectations that justice must fulfil. Therefore, judicial management can imply to assign judges timeframes and productivity benchmarks, but the same attention must be devoted to the guarantees concerning their independence and the quality of the judgments they deliver. Justice obviously needs deep debate, matured legal analysis, a soundly motivated decision and convincing arguments. On the other hand, focussing the attention only on substantial quality, rather than on procedural quality or efficiency, would be misleading. Eventually, attaining a truly effective judicial system is a matter of balance.³¹

5 Actors: Towards Whom Should EU Courts Be Accountable?

While considering the application of accountability mechanisms to EU courts, the nature of the actors involved plays a prominent role. Indeed, the actors entrusted with holding courts accountable influence the criteria towards which the courts' activity is evaluated, the consequences that can stem from evaluation and, therefore, the possible gains for the justice system. The issues at stake here are who the actors involved in the accountability mechanisms currently applied to EU courts are, to which portion of the objectives of the EU judiciary can these mechanisms contribute and whether an evolution of the existing model would be appropriate.

First of all, the need to articulate accountability with the principle of independence of the judiciary can limit the types of scrutiny that can be entrusted to the legislative and the executive. As far as the substantial quality of decisions is concerned, several guarantees are enshrined in the EU legal system, namely, the public nature of judgments and of most hearings, the requirement that judgments state the reasons on which they are based, and the very possibility to appeal judicial decisions

²⁹ See Jaeger (2009, 2017).

³⁰ Article 30 of Regulation (EU, Euratom) N° 966/2012 of the European Parliament and of the Council of 25 October 2012.

³¹ See Frydman and Jeuland (2011), pp. 5–11; Rousseau (2011), pp. 57–63; Jeuland (2011), *Ibidem*, pp. 87–101; Sauvé (2016), pp. 667–668; Ravarani (2011), pp. 49–55.

and have them reviewed. However, as stressed above, the content of judicial decisions can be subject solely to the scrutiny by the courts themselves.

External actors can, on the contrary, be involved with the evaluation of other aspects of the courts' activity. In this context, the choice of the organ in charge of evaluation should be guided by the need to achieve a good balance between accountability and independence and between all the objectives set for justice. To this end, the need of a deep understanding of judicial values and of the courts' functioning also comes into play.

At the national level, if the definition of standards and indicators is mostly done by law and involves the ministry of justice in several states, the monitoring of their achievement is entrusted to the judiciary in a striking majority of countries.³² In Member States where a council for the judiciary exists, this plays a relevant role in implementing accountability mechanisms. Usually composed partly by judges and partly by nominees of the legislature and the executive, councils for the judiciary are entrusted with guaranteeing the independence of the judicial system. With regard to accountability mechanisms, the councils' role is usually related to their competence regarding the appointment and dismissal of judges, the decisions concerning judges' careers and the management of courts' budget.³³

As concerns the EU judiciary, no such organ exists for monitoring and evaluating the achievements of the courts while preserving their independence. The EU Parliament plays a role with regard to the financial accountability of EU courts, whereas the courts themselves are directly involved in the monitoring of their

³² See European Commission (2018) *The 2017 EU Justice Scoreboard*, particularly at 33. See above, note 7. In a ruling of 23 March 2018, the French *Conseil d'État* has recently partially annulled the 2016 decree creating the inspectorate general of justice as it included the *Cour de cassation* within the mandate of the inspectorate general without providing additional safeguards related to the conduct of investigations and inspections with respect to the *Cour de cassation* or one of its members (C.E., 23 March 2018, nos 406066, 406497, 406498, 407474, *Syndicat Force ouvrière Magistrats et autres*, paragraph 14). In the same ruling, the *Conseil d'État* found that "The principle of separation of powers [...] [does] not prohibit the creation, by the Ministry of Justice, of a body competent to monitor and evaluate the activity of judicial courts, as far as it provides, by its composition, the status of its members, its organization and the conditions and the manner in which it intervenes, the guarantees necessary for the respect of the independence of the judicial authority and that its investigations do not lead this body to make an assessment of a specific judicial act. These principles do not preclude either that, within such a body, some of the inspectors do not belong to the judiciary if they are sufficiently qualified, under the condition that a judge who does belong to the judiciary is in charge of any investigation conducted upon the conduct of a judge and that investigations concerning the jurisdictional activity of a court are carried out under the direct authority of such an inspector" (*Ibidem*, paragraph 9. Free translation).

³³ See *ibidem*, at 42–45. European Network of Councils for the Judiciary. Councils for the Judiciary Report 2010–2011. Available via ENCJ. https://www.ency.eu/images/stories/pdf/workinggroups/report_project_team_councils_for_the_judiciary_2010_2011.pdf. Accessed 23 April 2018. European Network of Councils for the Judiciary. Working Group on the Evaluation of Judges (2005). Final Report. Available via ENCJ. https://www.coe.int/t/dghl/cooperation/cepej/quality/EvalJuges_en.pdf. Accessed 23 April 2018. CEPEJ (2004) Administration and management of judicial systems in Europe. Available via Council of Europe. https://www.coe.int/t/dghl/cooperation/cepej/series/Etudes10Admin_en.pdf. Accessed 23 April 2018.

quantitative performance and in the information of the Parliament and of the public through annual judicial and management reports.

The yearly budget approval and discharge procedures with regard to the CJEU are regulated by Articles 314 to 319 TFEU, introduced by the Treaty of Lisbon. Each year, based on an annual management report by the CJEU and a report by the Parliament's Committee on Budgetary Control, the Parliament grants discharge to the Registrar of the Court. The resolutions attached by the Parliament to the discharge decisions have often regarded the CJEU's efficiency and the measures taken to enhance it. The number of cases decided and the length of proceedings are used to assess the Court's performance; on numerous occasions, the Parliament recommended that the Court further reduces the duration of cases.³⁴

In 2014, another actor has come into play regarding EU courts' accountability, as the Parliament requested "that the Court of Auditors carry out a benchmark study which gives information about the output of comparable Supreme Courts in Member States and the Court of Justice."³⁵ This study actually took place between 2015 and 2017. The Court of Auditors undertook a performance review of the case management process of the CJEU, with a view to assessing "whether the procedures in place promoted the efficient handling of cases lodged and whether their timely resolution could be enhanced" and examining the "assessment and accountability tools in place at the CJEU."³⁶ The results were published in September 2017.

It is useful to stress the novelty of this review and the gains that it can bring to the effectiveness of the EU judiciary. More broadly, the evaluation of the CJEU's performance by the Parliament and by the Court of Auditors and the recommendations addressed by these organs to the CJEU can bring valuable results. Still, the nature of this evaluation calls back to the major issue, that is, whether the accountability mechanisms applied to EU courts so far are the most suited to promote a balanced achievement of all the objectives of an effective judicial system. Indeed, the implementation of mechanisms focussed on financial accountability and performance, in the absence of other mechanisms aimed at securing the other essential values of the judiciary, can influence the judges and the personnel of the courts in the sense of prioritising the former over the latter, instead of aiming at a synthesis of all these aspects.

The involvement of other actors would be constructive. On one hand, implying judges in the evaluation ensures a good understanding of the specificities of EU courts, their working methods and the principles that inspire them. On the other, the involvement of an external actor would increase the effectiveness of the accountability

³⁴ See, for instance, the Decision of the European Parliament of 27 April 2006 on the discharge for implementation of the European Union general budget for the financial year 2004, Section IV – Court of Justice (2006/812/EC), paragraph 8. See also Krenn (2017), pp. 453–474.

³⁵ Resolution of the European Parliament of 3 April 2014 with observations forming an integral part of its Decision on discharge for implementation of the general budget of the European Union for the financial year 2012, Section IV – Court of Justice, paragraph 11.

³⁶ European Court of Auditors (2017) Performance review of case management at the Court of Justice of the European Union. See above, note 18, p. 4.

mechanism. In this context, it is interesting to note that, as far as the appointment of judges of the Court of Justice and the General Court is concerned, the Treaty on the Functioning of the European Union has precisely established an independent organ composed of seven individuals chosen from among former members of EU courts, members of national supreme courts and lawyers of recognized competence, one of whom is proposed by the European Parliament.³⁷

6 Conclusion

The EU judiciary can benefit from accountability mechanisms with a view to providing a high-quality, independent, efficient justice. The commitment of the CJEU towards an increased efficiency is undeniable and the actions taken in this direction until today have borne considerable fruit. The evaluation of the CJEU's performance in order to ensure its financial accountability, so as performance reviews such as that carried out by the Court of Auditors between 2015 and 2017 contribute to the best use of public resources allocated to the CJEU and the public service it delivers to the public. This being said, attaining an effective judicial system, able to maintain its legitimacy and authority, is a matter of balance between efficiency and the other objectives of the EU judiciary. To this end, it is worth considering a wider reflection on the kind of organ that would be best suited for this task on the basis of a comparative analysis of national and international judicial systems.

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³⁷ Set up by virtue of the Lisbon Treaty according to Article 255 TFEU, this panel is entrusted with the competence to deliver non-binding opinions on the suitability of candidates for appointment to the Court of Justice and the General Court.

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The Acceptability of the Rulings of the European Court of Human Rights



Paul Mahoney

1 Foreword

I have to confess that it was with some trepidation that, in 2005 at the start of my function as President of the newly instituted, and now already defunct, European Union Civil Service Tribunal in Luxembourg, I awaited the appointment that was to be set up with Carl Baudenbacher in order to explore the possibility of organising a working meeting between our small Tribunal and his EFTA Court. Who was this man, I wondered, who could take on the job of succeeding the mythical and monumental Icelander, Thór Vilhjálmsson as President of the EFTA Court? When, very soon after my arrival in Luxembourg, I did meet Carl, at an official dinner of the EFTA Court, I discovered the congenial, cultured and dynamic reality of “this man”. What followed was a still continuing history of family friendship. This modest article on one aspect of judicial reasoning – namely, whether the acceptability of a court’s ruling should enter into the decision-making process of judges – is dedicated

Former President of the European Union Civil Service Tribunal, and former United Kingdom Judge at the European Court of Human Rights.

A revised version of the opening lecture of the 2014 Venice Academy of Human Rights, organised by the European Inter-University Centre for Human Rights and Democratisation in Venice in July 2014. That lecture was itself largely the product of a seminar held in Strasbourg in May 2014 as part of a series organised by an informal group of European public lawyers, the theme of the seminar and its introductory intervention coming from Andre Potocki, the French Judge on the European Court of Human Rights. Although not expressly naming the source of every idea borrowed, I gladly acknowledge that I have drawn on points made by participants at that seminar. I was also greatly assisted by research carried out by Victoria Chernychuk, a member of the Research Department of the Registry of the Strasbourg Court, assistance that extended not only to case-law and academic references but also to contribution of ideas and analysis.

P. Mahoney (✉)
Strasbourg, France

to Carl in thanks for that friendship, as well as being an expression of respect for his professional achievements.

2 Introduction: Other Judicial Notions Swimming in the Same Waters as Acceptability of Judicial Rulings¹

2.1 The Basics of Judicial Duty

At the end of the seventeenth century, the English Chief Justice Sir Matthew Hale had included in his list of “Things Necessary to be Continually had in Remembrance” when acting as a judge the following items:

11. That popular or court applause or distaste, have no influence into anything I do in point of distribution of justice.

12. Not to be solicitous what men will say or think, so long as I keep myself exactly according to the rule of justice.²

Also noteworthy, though not for the purposes of this paper, is the exhortation contained in point 18 on Sir Matthew Hale’s list: “To be short and sparing at meals that I may be fitter for business.”

It follows from the rule of law that a judge should decide according to what he or she understands to be the objective outcome under the law – ‘the rule of justice’, as Sir Matthew Hale called it – not influenced either by vociferous pressure groups pushing to obtain favoured recognition of their particular rights (on the theory that the louder you shout, the more rights you are liable to get) or by the likely popular or professional reception of the ruling. It could be said to be a basic deontological obligation, for all judges, at the core of judicial duty that they should not play to the gallery or blow with the changing winds of popular opinion.

But should we immediately write off any notion of the acceptability of judicial rulings because of this evident demand of judicial duty? The following discussion concentrates on the acceptability of the rulings of the European Court of Human Rights in Strasbourg (“the Strasbourg Court”), with a – necessarily brief – side-glance at the related notions of judicial power, judicial accountability and judicial legitimacy. The main questions addressed may be summarised as follows:

Is it appropriate for the Strasbourg judges to be influenced in the exercise of their judicial power by the likely acceptability of their rulings?

To what extent, if at all, can it be said that consideration of the likely acceptability of the ruling to be given is a component of the judicial decision-making process of the Strasbourg Court?³

Can any conclusions of general application be drawn from this enquiry into the acceptability of the rulings of the Strasbourg Court?

¹Parts of this section of the paper have been borrowed from: Mahoney (2016).

²Quoted in Bingham (2010), pp. 20–21.

³Wording inspired by the background note for the seminar mentioned on the opening page of this article.

2.2 *The Judicial Power and Judicial Accountability of the Strasbourg Court*

The judicial power of the Strasbourg Court is enormous. The Court has jurisdiction over the acts of 47 European States with a combined population of 800 million people whenever those acts can be claimed to have an impact on the enjoyment of the fundamental rights and freedoms guaranteed by the European Convention on Human Rights (“the ECHR”).⁴ This jurisdiction reaches into all corners of democratic life in the country – social, economic and political – and all areas of the domestic law and practice. When interpreting the very vague terms of the ECHR so as to give its abstract, “aspirational” guarantees concrete meaning in specific contexts, the Strasbourg Court is making new law. The Court is thus invested with an extensive lawmaking power. The right of individual petition to the Strasbourg Court represents the ultimate remedy available for disgruntled individuals, so that the Strasbourg Court can be said to have the “last word” over the national authorities.

But judicial power, wherever it is exercised, cannot be unlimited.⁵ Strasbourg judges, who are, and should be, independent, personally and in institutional terms, are not empowered to exercise entirely as they wish the far-reaching lawmaking power conferred on them by the international treaty under which they adjudicate. Judicial power, like all power, is not absolute and needs to be accompanied by some form of accountability.⁶

National legal orders integrate such accountability through checks and balances between the legislature, the executive and the courts, usually including mechanisms enabling the other branches of democratic government to react to judicial lawmaking that is taken to be incorrect or undesirable for society. The same degree of institutional checks and balances is lacking at international level, in that, for the most part, the cumbersome machinery of treaty amendment represents the sole option available to the other actors in the treaty system concerned for reversing jurisprudential changes of direction operated by an international court. The consequence should not however be that international judges are carried away by the feeling that they “are left responsible only to God”.⁷ The no less requisite accountability of international courts is thus to be achieved in a less visible manner.

The way that I would put it is that, although they are sitting in final judgment over 47 States, or rather precisely because they are, Strasbourg judges are subject to a social contract, a “contract of trust”, not to stray outside their assigned international judicial role but, instead, to exercise in a manner respectful of the other

⁴The word “act” is understood as including omissions wherever the ECHR imposes on the Contracting States a positive obligation to act in order to secure the guaranteed rights.

⁵The Strasbourg Court has had no difficulty in acknowledging that there are inherent limits on its powers of review – see, e.g., as early examples, the *Belgian Linguistic case (merits)*, 13 July 1968, Series A No. 6, §10 *in fine*; *Handyside v. United Kingdom*, 7 December 1976, §48; and *Ireland v. United Kingdom*, 18 January 1978, Series A No. 25, §207.

⁶Mahoney (2008), pp. 313–349.

⁷Terris et al. (2007), p. 205, quoting the sentiment of one international judge.

decision-makers in democratic society the enormous power of review they have been given, notably over “the people’s” democratic processes in each of the participating countries. It does not take much imagination to see this notion of the accountability of the Strasbourg Court spilling over into the parallel notion of acceptability. The exceptional power that the international judges on the Strasbourg Court have to, in effect, interfere in the democratic (notably political and legislative) processes in the ECHR countries not only brings with it a degree of accountability but also means that the Strasbourg judges should pay some heed to the societal consequences of their rulings.

2.3 *Judicial Legitimacy*

The acceptability of judicial rulings cuts across and covers some of the same ground as the more commonly known concept of judicial legitimacy, although the two notions are not co-extensive. Conceptually, they can be distinguished. Judicial legitimacy goes to the authority of the judicial institution in question. It encapsulates the relationship between governors and governed in the judicial process, in particular the perception of the governors by the governed; whereas acceptability goes to the results of the judicial process.⁸ However, not least because both are essential for the effectiveness of the system of human rights protection set up under the ECHR, acceptability is best understood as being enmeshed with legitimacy.

It has become rather fashionable these days to put under the microscope, even to put in question, the legitimacy of the Strasbourg Court.⁹ The concept of judicial legitimacy is a complex one; it is capable of meaning different things to different people. An interview-based study carried out in 2011 by a research team from University College London concluded that “legitimacy accounts of the European Court of Human Rights are multi-dimensional, with politicians, judges and lawyers plac[ing] different” – and contradictory – “legitimacy demands on the Court”.¹⁰

In brief, the different kinds or dimensions of judicial legitimacy which commentators have distinguished include: legal legitimacy (located for the Strasbourg Court in the ECHR, the treaty which set it up), political legitimacy (involving the relationship with the domestic law and institutions of the Contracting States), and moral and social legitimacy (that is to say, the Strasbourg Court’s fulfilment of its mission to stand up for the human rights of individuals against the pressures of State interest). “This [moral and social] dimension of legitimacy,” one scholar has written, “does not turn on the attitude of States towards the [Strasbourg Court], but on the

⁸Point made by Professor John Bell of Cambridge University at the seminar mentioned at n. 1 above.

⁹See, e.g., the papers in Flogaitis et al. (2013); and Dzehtsiarou (2015) ch. 6, which reviews the various challenges facing the Strasbourg Court’s legitimacy and the criticisms directed against the Court in that connection.

¹⁰Çalı et al. (2011), pp. 6, 35–36. See, by the same authors, Çalı et al. (2013), pp. 955–984.

capacity and willingness of the [Court] to translate the values of human rights into practical reality.”¹¹

Enabling the successful transformation of the ECHR’s abstract standards into concrete entitlements means, among other things, progressively adapting over time the protection afforded by the guaranteed rights so as to take account of new threats thrown up by the new ways in which European societies live and govern themselves. This is achieved through what is known in the jargon of ECHR law as “evolutive interpretation”, whereby the ECHR, like national constitutional instruments,¹² is interpreted and applied by succeeding generations of judges ‘as a living instrument, in the light of present-day conditions’ and not frozen to the conceptions and feared mischiefs that were in the minds of the ECHR’s drafters in 1949–1950.¹³

This “evolutionary” requirement of moral and social legitimacy inevitably creates tensions with political legitimacy, which prizes not only democratic autonomy for each local community but also the virtues of legal certainty: not moving the goalposts in an unforeseeable way for the entities that are made primarily responsible by the ECHR for implementing the guaranteed rights, namely the legislative, executive and judicial authorities of the Contracting States.¹⁴ This is a clear instance where making the Strasbourg Court’s rulings “acceptable” comes into the picture.

Other commentators have written in terms of the institutional and procedural legitimacy of the Strasbourg Court.¹⁵ In my departure speech last year on retiring as the United Kingdom judge on the Strasbourg Court, I ventured that, reduced to its barest essentials, *judicial legitimacy* is the product of *judicial power* being exercised in accordance with the requirements of *judicial duty*.¹⁶ However the analysis is structured, all seem to be agreed that the judicial legitimacy of the Strasbourg Court requires, among other things, that its judgments be accepted, not only by the parties to the judicial proceedings as such but well beyond that. This brings the discussion, after briefly straying into the domains of judicial power, judicial duty, judicial

¹¹ Feldman (2013), p. 220.

¹² As regards, e.g., the United States of America, see the oft-quoted dictum of the Supreme Court (Chief Justice Marshall) in 1819 in *McCulloch v. State of Maryland* 17 U.S. (Wheaton) 206 at 405–407, 415 that ‘we must never forget that it is a constitution we are expounding, a constitution intended to endure for ages to come’; and the statement one hundred years later by the same Court in *Weens v. United States* 217 U.S. 349 at 373 (1910): “Time works changes, brings into existence new conditions and new purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave birth to it.”

¹³ The living-instrument doctrine was first affirmed by the Strasbourg Court in *Tyrer v. United Kingdom*, 25 April 1978, Series A No. 26, where the issue was whether judicial corporal punishment (in the Isle of Man) could be regarded as degrading treatment, contrary to Article 3 ECHR. See Mahoney (2005); and, more generally, Bjorge (2014).

¹⁴ To this analysis, made by Feldman (2013), one could add: “the principle of legal certainty ... is necessarily inherent in the law of the [ECHR] as in [European Union] law”: *Marckx v. Belgium*, 13 June 1979, Series A No. 31, §58.

¹⁵ See, e.g., Zwart (2013); Bürli (2013), pp. 71–95 and 135–146, respectively.

¹⁶ Mahoney (2016).

accountability and judicial legitimacy, to the specific destination of the acceptability of the rulings of the Strasbourg Court.

3 Acceptability of the Strasbourg Court's Rulings

3.1 *The Mission and Legal Environment of the Strasbourg Court as Factors Going to Acceptability*

As with any court, the Strasbourg Court's attitude to the "acceptability" of its rulings is shaped by the particular mission assigned to it and by the legal environment in which it operates. Even though the vast majority of cases nowadays do not, happily, raise complaints of the kind of bad-faith governmental abuse that the framers of the ECHR had in their sights in 1949/1950, many cases are concerned with what one might call "disabling democracy" – that is to say, making the normal outcomes of democratic decision-making processes cede before the superior requirements of human rights protection. This notably involves protecting minorities, especially vulnerable and unpopular minorities with no vote-catching potential – such as suspected terrorists, convicted prisoners, mental patients, handicapped persons, asylum seekers, Roma, vagrants and homeless persons, minority ethnic or religious groups, foreigners in general and so on – from the excesses of majority rule, even though those excesses may be unintended and adopted in good faith for legitimate purposes in the general interest of the community and even though it be majority rule conducted in accordance with normal democratic processes.

By definition, therefore, judges on the Strasbourg Court have the task of taking decisions that are sometimes liable to go against the constitutional and legal traditions of the country and to be unwelcome to the powers-that-be and perhaps even unpopular with large sectors of the public. In such cases the Court has to rely on its legitimacy, its authority, within the ECHR system so as to ride out the storm. The Court should not abdicate its responsibility to deliver unpopular judgments, is the rallying cry one often hears: the Strasbourg Court is not there to please.¹⁷

And this is of course true – it constitutes one of the immutable basics of judicial duty as defined by Sir Matthew Hale; but it is only true as far as it goes; for it would be simplistic to think that the debate stops there. There are nuances. Within the logic of the ECHR system of international judicial control of democratic action taken at national level by the authorities of sovereign States, "acceptability" can mean other

¹⁷ See, e.g., Spielmann (2014) citing the judgments delivered in *X. v. Austria*, application no. 19010/07, 19 February 2013 (concerning the legal status of families with parents of the same sex); and *Del Rio Prada v. Spain* [GC], application no. 42750/09, 21 October 2013 (concerning postponement, as a result of new case-law by the Supreme Court, of the date of final release of a person convicted of terrorism) – both judgments reported in ECHR 2013: "The role of a Court such as ours, unless it were to depart from its intended mission, is not to be popular. Sometimes it is even necessary to cause displeasure."

things than simply pandering to political populism or bowing before feared criticism. Even when the relevant canons of interpretation of the Convention are rigorously applied, it is not always evident that a given solution is the only one that necessarily follows from the abstract norms as they are worded in the text of the ECHR. In hard cases, there will exist more than one plausible decisional or interpretative alternative. The question is: what are the relevant considerations capable of pushing the decision one side of the line rather than the other? The frontier between local democratic discretion, national constitutional traditions, cultural identity – call it what you will – and the “law” of the ECHR is not always so clear-cut.

What is more, harking back to the above conclusion on judicial legitimacy, it can be said that acceptance of the authority of the Strasbourg Court by and within the participating countries lies at the heart of the international system of human rights protection set up by the ECHR.

Human rights law, in comparison with black-letter law in areas such as tax and customs duties, town-and-country planning and telecommunications operations, is particularly open to the exercise of judicial choice in interpretation – because of the open-ended language, with its indeterminate meaning, that one finds in human rights instruments; because human rights cases represent the largely uncharted terrain where law and social policy, law and politics, law and morality meet; and because of the necessarily evolving content over time of many of the guarantees set forth in human rights instruments.

To give my answer to the first question posed at the outset: when confronted with such difficult and sensitive interpretational choices, which more often than not have as their subject-matter controversial social or moral problems on which opinions in democratic society differ, it may well be appropriate in certain circumstances for the international human rights judge, sitting in judgment on the product of the normal functioning of the democratic process at national level in the sovereign States, to have regard to the potential consequences of the chosen interpretation for the society of the country concerned and for democratic society in Europe in general. To my mind, there should be nothing untoward in the Strasbourg Court trying to identify whether an interpretative solution is liable to cause disruption or to be resisted within a democratic society by reason of its consequences. This does not entail that the Court should always cede before such considerations; merely that in the reasoning process some attention, not necessarily decisive, should be paid to them. The Court must in particular show that it does take seriously the democratic institutions in the societies of the participating countries, notably the courts and the elected parliaments. We are talking, not about human rights in a self-contained principled vacuum, but about human rights in political democracy.

Indeed, such an analysis of the power of international human rights adjudication conferred on the Strasbourg Court follows from the text of the ECHR, by virtue of which the primary responsibility for implementing the ECHR rights is placed on the Contracting States,¹⁸ with the Strasbourg Court having the more limited role of

¹⁸ Article 1 ECHR, which provides: “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in ... this Convention”.

ultimate external judicial control,¹⁹ backed up by the supervisory role of the Committee of Ministers of the Council of Europe in relation to execution of the Court's judgments.²⁰ In thereby situating the centre of gravity for protection of the ECHR rights at national level, the text of the ECHR necessarily presupposes the loyal cooperation of all institutional actors concerned, national and international. This logic as to the interaction between the international and national levels in the functioning of the ECHR system is expressed in the fundamental ECHR principle of subsidiarity, whereby the international enforcement machinery in Strasbourg is subsidiary to the national mechanisms protecting human rights,²¹ and in the notion of "shared responsibility" advocated in recent years by the Strasbourg Court.²² On this logic, the optimal effectiveness of the ECHR system evidently depends on the national authorities accepting the authority of, and working with, the Strasbourg Court.

The latter conclusion especially applies if the Strasbourg Court wishes to see its judgments successfully executed by the respondent State, given that the process of judgment-execution, under the supervision of the Committee of Ministers following the close of the judicial procedure as such, is one of the acknowledged weaker links in the ECHR's chain of armour. In the words of one academic author:

International tribunals, including the [Strasbourg Court], face a substantial structural deficiency; they operate within systems that lack the coercive capacity to enforce their judgments. International courts thus depend, to a greater degree than national courts, on the legitimacy of their judgments as a basis upon which to encourage, and in effect coerce, compliance.²³

Turning to another point, by reason of their content and implications for day-to-day life in the country concerned, the Strasbourg judgments are capable of speaking directly to "the people". The public-opinion colouring of acceptability can be seen from the howls of rage and incomprehension that are sometimes heard from some national quarters when the Strasbourg Court is considered not to have taken sufficiently into account the democratic liberty or the traditions of the country concerned. It would be mistaken simply to dismiss this phenomenon as one of populism, not worthy of notice by an international court having the noble task of protecting

¹⁹Article 19 ECHR, which provides: 'To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights ...'.

²⁰Article 46 (§§1 and 2) ECHR, which provides: '1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties. 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution'.

²¹The notion of subsidiarity appeared very early on in the Strasbourg case-law, in the *Belgian Linguistic case (merits)*, 13 July 1968, Series A No. 6, §10. Mention of the principle of subsidiarity will be incorporated in the Preamble to the ECHR once Protocol No. 15 comes into force. Among the vast mass of scholarly writings on the principle of subsidiarity, see, as two recent examples: Spano (2014) and Mowbray (2015).

²²See, inter alia, the Strasbourg Court's written observations submitted to the Brighton Conference (2012).

²³Dzehtsiarou (2015), p. 1. See also similar observations made in Mahoney (2009a).

human rights. As stressed above, the Convention is anchored in the endeavour to implement human rights in political democracies. Ultimately, the authorisation for judicial power, and the Strasbourg Court's power in particular, comes from the people. In practically all our countries, the courts deliver their judgments "in the name of the people".²⁴

In regard to a judicial decision by the British House of Lords in which the judges disavowed any concern with whether their decisions were "an affront to the public conscience",²⁵ one academic commentator famously asked: "Whose law do they think it is anyway?"²⁶ As another English legal scholar expressed it a few generations earlier:

The duty of the court is to keep the rules of law in harmony with the enlightened common sense of the nation.²⁷

Carl Baudenbacher himself in his remarks on leaving office as President of the EFTA Court adverted to the acceptability of judicial rulings in similar terms, when he said:

I tend to subscribe to what Richard Posner said when he resigned from the United States Court of Appeals for the Seventh Circuit in September 2017; namely that from a 'pragmatic' perspective, a judge often simply has to adopt a common-sense solution:

"[T]o be pragmatic just means to focus on consequences. What are the likely consequences of each, say, two alternative rulings that are within the judge's authority to make? ... [H]aving found the pragmatic result, the judge asks whether it is blocked by some authoritative ruling, principle, rule – whatever."

If this pragmatism is underpinned by economic considerations, it is all the better.²⁸

Too many howls of rage, too often, in regard to too many of the Contracting States and to matters which are held to heart by the local population – although we are nowhere near any such position today – are liable to undermine the very basis of the Strasbourg Court's authority to issue its judicial rulings against the Contracting States.

And it remains that all courts invested with the power to disable the actions of national parliaments and elected governments – national supreme and constitutional courts as well as international human rights courts – need, as was once said of the United States Supreme Court, to have the hearts and minds of the people if they are to fulfil their function satisfactorily. Yet today, generally speaking, public support for the project of building greater European unity is at risk of falling away. While not forgetting the manipulation of public opinion by and through the media that we can witness every day, the challenge not to lose public support, a challenge that evidently brings with it many dangers, is one not only for the European Union but also for the Strasbourg Court and the Council of Europe.

²⁴ Point made by Guido Raimondi (President of the Strasbourg Court) at the seminar mentioned at n. 1 above.

²⁵ *Tinsley v. Milligan* [1994] 1 A.C. 340.

²⁶ See Tony Weir (1936–2011) in Weir (1996), reproduced in Weir (2012).

²⁷ Sir Frederick Pollock (1845–1937) in Pollock (1929).

²⁸ Baudenbacher (2018).

A parallel consideration to public support is that of judicial confidence. As noted earlier, by virtue of the principle of subsidiarity inherent in the ECHR, it is the national judges, at national level, who should be assuming the bulk of the responsibility for judicial protection of the human rights of individuals against State action. For this to work, it is essential that the national judges have confidence in the quality of the case-law coming out of Strasbourg.²⁹

Considerations of judicial legitimacy and acceptability of judicial rulings coincide when the Strasbourg Court is accused of exceeding its treaty-given, solely judicial role of interpreting and applying the limited category of fundamental rights defined in the text of the ECHR, accused of the sins of expansionism, over-intervention and mission-creep, accused of thereby trespassing into the realm of treaty amendment reserved for the Contracting States and into the realm of social policy-making reserved for the democratic institutions at national level. As a French commentator, writing on activism and self-restraint on the part of the Strasbourg Court, has put it:

[I]n giving [the European Governments] the sentiment that the system they created is completely eluding them, the Court would be running the risk of prompting or aggravating reticence on their part to implement the [ECHR]. Developing a conflictual relationship with the Contracting States would undermine not only the protection of individual rights but also the foundation of the Court's authority.³⁰

To sum up under this head: if the foregoing perspectives are taken together, an element of “acceptability” of the Strasbourg Court’s rulings can be said to be inherent in the ECHR system of international protection of human rights.

3.2 Manifestations of “Acceptability” in the Case-Law and Practice of the Strasbourg Court

Although the Strasbourg case-law is replete with appeals to the need to ensure the effectiveness of the ECHR system and the ECHR rights as an explanation for choosing a given interpretative approach (discussed below),³¹ the Strasbourg Court is not

²⁹ See, e.g., the summary of the view expressed in 2003 by speakers at an international symposium held in Graz (Austria) – in Rodger (2003), p. 151; Lord Rodger was a judge on the United Kingdom Supreme Court: “The [Strasbourg] Court plays a crucial role in developing the law of human rights in the countries of the Council of Europe. The highest national courts would only respect the Court’s judgments and strive to apply its jurisprudence, however, if they could see that the judgments were indeed carefully, cogently and consistently reasoned. That was not always the case at present.”

³⁰ Delzangles (2009), p. 402. Unofficial translation into English by the present author from the original, which reads: “(...) *en donnant [aux gouvernements européens] le sentiment que le système européen qu’ils ont créé leur échappe totalement, la Cour risquerait de provoquer ou d’aggraver leurs réticences à appliquer la Convention. Développer une relation conflictuelle avec les Etats parties irait à l’encontre non seulement de la protection des droits individuels mais aussi de l’affermisssement de l’autorité de la Cour.*”

³¹ Beginning with *Airey v. Ireland (merits)*, 9 October 1979, Series A No. 41, §24, where the

at all in the habit of expressly adverting to any concern that it might have as to the acceptability of its ruling.

There are a few, rare exceptions. Thus, in the 1979 landmark case of *Marckx v. Belgium*, when specifying the non-retroactive effect of its judgment holding certain domestic legislative provisions on property rights to be incompatible with the ECHR, the Strasbourg Court,³² quoting verbatim a judgment of the Court of Justice of the European Communities, explicitly recalled “the general principles of law whereby the practical consequences of any judicial decision must be carefully taken into account, subject to [its being] impossible to go so far as to diminish the objectivity of the law and compromise its future application on the ground of the possible repercussions which might result, as regards the past, from such a judicial decision”.³³

Despite this reticence to speak directly of the issue, a study of the case-law discloses that there do exist techniques of reasoning employed by the Strasbourg Court in order to enhance the acceptability, in a broad sense, of its rulings. These techniques of reasoning may take the form of case-specific or country-specific argumentation, strategic methods of interpretation or choices of judicial policy. They are directed towards achieving not only the acceptability of a specific ruling seen as liable to be problematic, either in the country concerned or in relation to existing case-law, but also the overall acceptance of the Court’s decision-making authority under the ECHR system.

To begin with an obvious example, the budgetary or administrative costs entailed in ruling one way or another³⁴ and the impact on the allocation of scarce economic resources as between competing needs of the community – say, in the health and education sectors – have been recognised in the Strasbourg Court’s case-law as factors properly to be weighed in the balance when applying the principle of proportionality within the framework of the doctrine of the margin of appreciation (discussed below).³⁵

Factors accorded similar recognition have included the constitutional, legal and cultural traditions of the country – for instance, the requirement for elected representatives in the United Kingdom to take an oath of allegiance to the monarch,

applicant, who came from a humble family background, complained of the inaccessibility of the remedy of judicial separation for a person such as herself. See *Kudla v. Poland* [GC], application no. 30210/96, ECHR 2000-XI, §§152 *in fine*, 155, for the extension of “effectiveness” reasoning from the substantive content of the guaranteed rights and freedoms to the functioning of the ECHR system itself – where it was held that Article 13 ECHR required a Contracting State to make available a domestic remedy to complain about unreasonable length of civil or criminal court proceedings (as guaranteed by Article 6§1 ECHR).

³² *Marckx v. Belgium*, 13 June 1979, Series A No. 31 (which concerned the legal status of unmarried mothers and children born out of wedlock), §58.

³³ The quotation is from *Defrenne v. Sabena*, 8 April 1976, Reports 1976, p. 480.

³⁴ E.g., *Ünal Tekeli v. Turkey*, CORRECT application no. 29865/96, ECHR 2004-X (extracts), §67 (in relation to the repercussions of changing the traditional system of family names).

³⁵ E.g., *Macdonald v. United Kingdom*, application no. 4241/12, 20 May 2014, §§54–58 (concerning the withdrawal of an allowance for handicapped persons); *N. v. United Kingdom* [GC], application no. 26565/05, ECHR 2008-III, §44 (in relation to provision of health care to illegal aliens).

something not really appreciated by Sinn Féin politicians in Northern Ireland;³⁶ or the particular historical, political and religious context in which the country finds itself, and the constraints that that brings with it for the governing authorities. Such constraints taken into account by the Strasbourg Court when assessing ECHR compliance have derived from, for example, the political, indeed moral choices facing German society in the post Second World War period;³⁷ the specific secular pressures on the Turkish State;³⁸ the enormous problems – economic, political and social – thrown up for the ex-Soviet-bloc countries after the fall of communism by the transition from authoritarian rule to democracy;³⁹ the historically divisive role of religion in Irish society.⁴⁰ The case-law illustrations abound.

Such sensitivity to national “political” choices, which, naturally, is calibrated and is neither unconditional, nor unlimited, nor always decisive, could be characterised as a manifestation of “acceptability” being integrated into the Strasbourg Court’s judicial process, since regard is being had to the potential disruption that a given ruling may entail for the local community concerned.

In line with its case-law emphasising the close connection between fair trial under Article 6 ECHR and acceptability of decisions by national courts,⁴¹ the Court’s own procedural rules and practice can be seen to reflect the recognition that acceptability of its own rulings requires that they be rendered in accordance with a procedure that is perceived to be fair and transparent. Going further, the function of the ECHR as a “people’s charter”, rather than as, say, an international instrument for regulating relations between States in some technical domain, affects how the Strasbourg Court and its judges go about discharging the procedural side of their judicial task. Some years ago, I wrote the following on the drafting process of the Strasbourg Court’s judgments:

[T]he purpose of the [ECHR] as an instrument of international law intended for the benefit of ordinary people and to be applied, not just by the Strasbourg Court, but, more

³⁶ *McGuinness v. United Kingdom* (admissibility decision), application no. 39511/98, ECHR 1999-V, p. 490.

³⁷ *Vogt v. Germany*, 26 September 1995, Series A No. 323, §59 (concerning the dismissal of a teacher from the civil service on account of her political activities on behalf of the German Communist Party, but where a violation of the ECHR was nevertheless found to have occurred).

³⁸ *Leyla Sahin v. Turkey* [GC], application no. 44774/98, ECHR-2005-XI, §116 (concerning a ban on wearing religious symbols in universities).

³⁹ *Rekvenyi v. Hungary* [GC], application no. 25390/94, ECHR 1999-III, §41 (concerning a ban on political activity by police officers); *Zdanoka v. Latvia* [GC], application no. 58278/00, ECHR 2006-4, §§133-134 (concerning disqualification from standing in parliamentary elections on account of participation in a political party, given the latter’s involvement in an attempted *coup d’état*); *Tanase v. Moldova* [GC], application no. 7/08, ECHR 2010-III (extracts), §§173-174 (concerning a ban on multiple nationals sitting as members of Parliament).

⁴⁰ *Murphy v. Ireland*, application no. 44179/98, ECHR 2003-IX, §§73-75 (concerning prohibition of the broadcasting of religious advertisements).

⁴¹ See, e.g., *Taxquet v. Belgium* [GC], application no. 926/05, ECHR 2010-VI, §91 (concerning the provision of adequate procedural safeguards to enable the accused to understand the lay jury’s guilty verdict in criminal proceedings); *Kress v. France* [GC], application no. 39594/98, ECHR 2001-VI, §78 (concerning procedure before the French *Conseil d’Etat*).

importantly on a daily basis by the national authorities, notably the courts, across the whole of the domestic legal order [in each ECHR country] has repercussions not only for the methods of interpretation of the text ..., but also for the language used in the judgments. ... [T]he drafting style and the vocabulary employed tend to be simple. A deliberate effort is made to explain and justify as clearly as possible the result arrived at, with what has been described as an evident 'pedagogic' objective of persuasion. This is because the confidence of the national authorities, who are called on in the first place to translate into national practice the jurisprudential principles generated by the Court's judgments, and [the confidence] of the public, both specialist and general, [are] being sought. As the [former] President of the Court, Jean-Paul Costa, has written, the Contracting States and their courts will be better able and all the more inclined to follow Strasbourg case-law if it is "accessible, rational, understandable, in brief credible".⁴²

Concerning specifically methods of interpretation aimed at securing this "credibility" of rulings, one could mention two strands – one conceived rather to take account of the interests of the right-holders and the other to take account of the role assigned to national authorities to implement the ECHR rights.

Within the first strand comes the guiding principle, adverted to earlier, that "the [ECHR] is intended to guarantee not rights that are theoretical and illusory but rights that are practical and effective".⁴³ In countless cases since it was first clearly enunciated in 1979, this principle of "effectiveness" has pushed the interpretation of the ECHR towards solutions favourable to individuals,⁴⁴ thereby securing the moral legitimacy of the Strasbourg Court as referred to earlier. The same applicant-friendly quality can be attributed to the principle whereby, in determining ECHR rights, one must frequently look beyond appearances and concentrate on the realities of the situation.⁴⁵ Through the exercise of translating the abstract norms of the ECHR into concrete human rights entitlements by means of such methods of interpretation, the general acceptability of the Strasbourg Court's rulings is being achieved for the public at large, as well, of course, as their narrower acceptability for the applicants

⁴² Mahoney (2009b), citing Costa (1998), p. 206: "[L]es Etats et leurs juges nationaux suivront d'autant mieux la jurisprudence de la Cour qu'elle sera accessible, rationnelle, lisible, bref credible".

⁴³ *Airey v. Ireland (merits)*, 9 October 1979, Series A No. 41, §24 (where the complaint was directed against practical rather than legal obstacles on access to court, as guaranteed by Article 6§1 ECHR).

⁴⁴ To take but one well known example, see *Soering v. United Kingdom*, 7 July 1989, Series A No. 161, §87 (concerning extradition to the United States of America to face a first-degree murder charge, with the likelihood of a long wait on death row): "In interpreting the [ECHR], regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms Thus, the object and purpose of the [ECHR] as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective ...".

⁴⁵ See, as early authorities, *Delcourt v. Belgium*, 17 January 1970, Series A No. 11, §31 (concerning the participation of a member of the Procureur général's department in the deliberations of the Court of Cassation); and *Deweert v. Belgium*, 27 February 1980, Series A no. 35, §38 (concerning the issue whether a shopkeeper's waiver of his right to trial before a criminal court had been obtained by constraint).

in the specific cases, together with all other individuals in the ECHR countries who are in a similar position.

The noteworthy example under the second strand of methods of interpretation is the doctrine of the margin of appreciation, which, as the substantive expression of the principle of subsidiarity, represents the major interpretative tool for arbitrating between the Strasbourg Court's power of review and the democratic liberty of action of the national authorities.⁴⁶

At the risk of over-simplifying, one could say that a broad margin of appreciation tends to be recognised when it comes to regulating the economic and social policy of the country⁴⁷ or to sensitive or intractable moral or ethical issues such as abortion,⁴⁸ donation to research of preserved embryos,⁴⁹ *in vitro* fertilisation,⁵⁰ the legal status of same-sex couples,⁵¹ the granting of parental rights to transsexuals⁵² and so on. As was reiterated recently by the Grand Chamber of the Strasbourg Court in a French case challenging the prohibition on wearing clothing designed to conceal one's face (notably the full-face veil) in public places:

It is ... important to emphasise the fundamentally subsidiary role of the [ECHR] mechanism. The national authorities have direct democratic legitimation and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions. In matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight ...⁵³

On the other hand, "European consensus" in the sense of common, though not unanimous, approaches in the laws and practices of the Contracting States⁵⁴ is prayed in aid in order to justify a narrow margin of appreciation and evolutive inter-

⁴⁶ Mention of the margin of appreciation, along with that of the principle of subsidiarity, will likewise be added to the Preamble to the ECHR once Protocol No. 15 comes into force (see n. 24 above).

⁴⁷ See, e.g., *Lithgow and Others v. United Kingdom*, 8 July 1986, Series A No. 102, §122 (concerning legislation nationalising the shipbuilding and aircraft industries); *Carson and Others v. United Kingdom* [GC], application no. 42184/05, ECHR 2010-II, §61 (concerning absence of uprates of State retirement pensions on the ground of non-residence in the country); *Stummer v. Austria* [GC], application no. 37452/02, ECHR 2011-V, §89 (concerning non-affiliation of working prisoners to the State old-age pension scheme).

⁴⁸ *A, B and C v. Ireland* [GC], application no. 25579/05, ECHR 2010-VI, §§226-227, 233.

⁴⁹ *Parillo v. Italy* [GC], application no. 46470/11, 27 August 2015, ECHR 2015.

⁵⁰ *S.H. and Others v. Austria* [GC], application no. 57813/00, ECHR 2011-V, §114.

⁵¹ *Schalk and Kopf v. Austria*, application no. 30141/04, ECHR 2010-IV, §§105-106. See, however, the recent chamber judgment in *Oliari v. Italy*, applications nos. 18766/11 and 36030/11, 21 July 2015.

⁵² *X, Y. and Z. v. United Kingdom*, Reports of Judgments and Decisions 1997-II, §44.

⁵³ *S.A.S. v. France* [GC], application no. 43835/11, 1 July 2014, ECHR 2014, §129. See also *Hatton and Others v. United Kingdom* [GC], application no. 36022/97, ECHR 2003-VIII, §97, which spoke of the "direct democratic legitimation" that the national authorities, in particular the legislature, enjoy.

⁵⁴ For a thorough study of the topic, see Dzehtsiarou (2015). See also Wildhaber et al. (2013); Kondak and Mahoney (2015), pp. 119-140.

pretations – that is, interpretative leaps forward changing into an ECHR obligation something that was previously outside the scope of the ECHR or previously a matter within the discretionary power of the Contracting States – in relation to matters such as, just to give a few examples, non-recognition of conscientious objection,⁵⁵ the differential legal status and inheritance rights of children born out of wedlock⁵⁶ and the criminalisation of consensual homosexual conduct in private.⁵⁷ The identifiable overall acceptability of the obligation at national level within the ECHR community as a whole is invoked in support of the Strasbourg Court's importing it into the ECHR as an international obligation and thereby imposing it on the respondent State which is out of line with the others.⁵⁸ One might call this a consensual technique of interpretation. Appeals to comparative law, European and international, serve to demonstrate that the Strasbourg Court is applying today's largely shared values and not taking the initiative in inventing tomorrow's values or embarking on its own social agenda under the guise of legal reasoning.

Conversely, where the Strasbourg Court pushes ahead in finding democratically enacted legislation to be in violation of the ECHR despite the absence of any European consensus at all in the matter but rather in the face of a sizeable group of States opting for the same legislative solution as that of the respondent State, problems of acceptance and of execution of the judgment are foreseeable. The saga of prisoners' voting rights in the United Kingdom is a vivid illustration of such problems.⁵⁹

In the same general context of interplay between the Strasbourg Court and the national legal systems, where the superior national courts have indicated in one of their judgments their view that the Strasbourg Court has "got it wrong" on some ECHR issue, for example because of a misunderstanding of national law or practice, the Strasbourg Court has not hesitated in showing its willingness to review and even, where appropriate, adapt its previous jurisprudential stance. In a 2011 case against the United Kingdom, the Grand Chamber, in response to a measured and well reasoned judgment of the British Supreme Court, attenuated the terms of the apparently inflexible test that it had previously spelt out in its case-law as regards the implications for the fairness of criminal proceedings of the admissibility of hearsay evidence of a witness who had died.⁶⁰

⁵⁵ *Bayatyan v. Armenia* [GC], application no. 23459/03, ECHR 2011-IV, §§103,108.

⁵⁶ *Marckx v. Belgium*, 13 June 1979, Series A No. 31; and *Fabris v. France* [GC], application no. 16574/08, ECHR 2013-I (extracts), §§57-58, 69.

⁵⁷ *Dudgeon v. United Kingdom (merits)*, 23 September 1981, Series A No. 45.

⁵⁸ Kondak and Mahoney (2015).

⁵⁹ *Hirst v. United Kingdom (No. 2)* [GC], application no. 74025/01, ECHR 2005-IX; and *Greens and M.T. v. United Kingdom*, applications nos. 60041/08 and 60054/08, ECHR 2010-VI (extracts).

⁶⁰ *Al-Khawaja and Tahery v. United Kingdom* [GC], applications nos. 26766/05 and 22228/06, ECHR 2011-VI, responding to *R v. Horncastle and Others* [2009] UKSC 14. See the ultimate (chamber) judgment of the Strasbourg Court in *Horncastle and Others v. United Kingdom*, application no. 4184/10, 16 December 2014, unreported.

This sensitivity to its judicial partners at national level, this two-way dialogue between superior domestic courts and the Strasbourg Court,⁶¹ is likewise an illustration of “acceptability” considerations playing an “appropriate” and positive role in the Strasbourg Court’s judicial decision-making process.

In similar vein, care is taken to justify and explain departures from established case-law (precedent),⁶² demonstrating the Strasbourg Court’s concern to ensure acceptance of its inroads into the guarantee of legal certainty on which the Contracting States and, in particular, the national courts, are entitled to rely.⁶³

The commentaries of academic scholars, notably in the universities, on the judgments have increasingly become something that the Court will, albeit perhaps not so visibly, have regard to.⁶⁴ There is not only a dialogue between judges, but also a continuing dialogue with the academic community – a dialogue going to the acceptability of the judgments in all sorts of technical, logical, moral respects, and a dialogue which will also influence, not necessarily openly or decisively of course, the judicial decision-making process in Strasbourg.⁶⁵

The acceptability of the ruling also enters the picture in the field of reparation, or “just satisfaction” as it called by the ECHR (Article 41), afforded to victims of human rights violations. It is by no means infrequent for the Strasbourg Court to hold that, despite the finding of a violation of the ECHR and perhaps even presumed non-material prejudice, no award of financial compensation is called for. In such cases the Court’s conclusion will often take the form of a declaration that the finding of a violation in itself constitutes adequate “just satisfaction”, without the need for a pecuniary award. One of the best known examples of a no-compensation ruling was in the *Death-on-the-Rock* case, where, on account of certain shortcomings in the organisation of an anti-terrorist operation carried out by the British security forces in Gibraltar, the shooting of three IRA members engaged in a planned bombing attack on a tourist site was held to be in breach of the requirements of the right

⁶¹ See Bjorge (2015), in particular ch. 8 on dialogue between the domestic courts and the Strasbourg Court.

⁶² As examples, see *Stec and Others v. United Kingdom* (inadmissibility decision) [GC], applications nos. 65731/01 and 65900/01, ECHR 2005-X, §§46-47; and *Vilho Eskelinen and Others v. Finland* [GC], application no. 63235/00, ECHR 2007-II, §§50-62.

⁶³ Mahoney (2011a).

⁶⁴ As examples of rulings where reliance has been placed on academic writings, see *Behrami and Behrami v. France, Germany and Norway* (dec.) [GC], applications nos. 71412/01 and 78166/01, 2 May 2007, §§69, 130 and 132 (concerning acts performed by KFOR and UNMIK in Kosovo under the aegis of the United Nations); *Beric and Others v. Bosnia and Herzegovina* (dec.), applications nos. 36357/04 etc., 16 October 2007, §27 (concerning the applicants’ removal from functions by decision of the High Representative for Bosnia and Herzegovina whose authority derived from United Nations Security Council Resolutions); and *Korbely v. Hungary* [GC], application no. 9174/02, ECHR 2008-IV, §§82-83 (concerning crimes against humanity and the prohibition on retroactivity of criminal offences).

⁶⁵ See Birks (1998), pp. 399–400, who talks of an emerging partnership in the “juristic function” of interpretation of Anglo-Saxon common law between judges and legal academics – an analysis that the present author has argued can be transposed to the judge-made interpretative law of the Strasbourg Court: Mahoney (2011b), p. 281.

to life as protected by the ECHR (Article 2). The claim of the applicant families of the victims for financial compensation for the killing of their relatives was, however, rejected. The Court's reasoning being that, "having regard to the fact that the three terrorist suspects who were killed had been intending to plant a bomb in Gibraltar, the Court [did] not consider it appropriate to make an award under this head".⁶⁶ Such rulings can be seen as examples of the Strasbourg Court taking into account the basic sense of justice of the public and "keep[ing] the rules of law in harmony with the enlightened common sense of the nation", in the words of the quotation cited earlier.

And so on. The examples of the techniques employed by the Strasbourg Court to enhance the acceptability of its rulings could be multiplied. There are many elements to the mosaic.

The short point is that what is at stake, underneath these decisional, drafting and interpretative considerations, is confidence, on the part of the national judges, the Governments, the non-governmental organisations (who are increasingly intervening with third-party briefs),⁶⁷ the applicants of course, academic commentators and the public at large, in the quality of the Strasbourg Court's rulings. As one veteran French ECHR-watcher, Professor Frédéric Sudre of Montpellier University, has pithily expressed it, the reasoning deployed by the Strasbourg Court in a given ruling is aimed at all the various recipients of the ruling with a view to obtaining their support for the decision arrived at.⁶⁸ There needs to be an understanding that "foreign" judges are not being overbearing and imposing illegitimate restrictions on each country's democratic processes from far away on top of an ivory tower, but are carrying out the sometimes unpopular but necessary task conferred on the Court of protecting fundamental rights of individuals, in particular from the sometimes unintended excesses of majority rule.

It is not suggested that these foregoing rather woolly and imprecise considerations of what one might call "acceptability" of its judicial rulings represent formal criteria to be taken into account by the Strasbourg Court when deciding individual cases. Nonetheless, for a Strasbourg judge to keep at the back of his or her mind, when exercising the Court's considerable judicial power over the democratic processes of the participating countries, this "contract of trust", referred to earlier, is not "inappropriate", but is an inherent, almost invisible component of the process of international judicial review of national democratic action under the ECHR.

⁶⁶ *McCann and Others v. UK*, 27 September 1995, Series A no. 324, §219.

⁶⁷ Note the view expressed in Bűrli (2013), according to which third-party briefs, by enabling civil society to influence the litigation, can usefully serve as one means, among others, of reinforcing the legitimacy of the Strasbourg Court.

⁶⁸ Sudre (2013), p. 177.

4 Any Conclusions of General Application?

Can any conclusions of general application be drawn from this inquiry into the “acceptability” of the rulings of the Strasbourg Court? Yes, I think so. I would draw the following:

1. Incumbent on any court is the basic judicial duty to decide objectively, independently and impartially according to the “law”, not ceding before the possible adverse reactions of the directly interested parties or the general or specialised public.
2. The specific mission of courts having the task of protecting the fundamental rights of individuals accentuates this duty to give rulings liable to attract criticism or opprobrium.
3. On the other hand, being invested with such a mission brings courts such as the Strasbourg Court closer to “the people”, with the consequences that that involves for the relationship between judicial power and political democracy. These consequences go to such matters as
 - (a) the “technical” ones of the style of drafting and modes of reasoning of judgments, or
 - (b) the less tangible ones of finding appropriate mechanisms giving expression to the accountability of the court to “the people” for the exercise of its power to disable the outcome of the democratic process; and
 - (c) sometimes requires the court to rule on issues having social, political or economic repercussions, repercussions that may have to be taken into account in the process of adjudication.
4. By way of general inference from the latter observation, it may be said that, for all courts, the “law” itself and the judicial function of interpreting the law may well on occasions incorporate a need to take into account the practical consequences of ruling one way rather than another, including the “acceptability” of the disruption that any given ruling will cause for the society concerned.

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Some Reflections on the Legitimacy of the Strasbourg Judge



Georges Ravarani

Judges may spend their professional lives conscientiously, haunted by doubt about their decisions, without being led to wonder why litigants would come to somebody they do not know but are willing to trust and whose decisions they are prepared to accept. This question appears both fundamental and unsettling.

In the past, the answer to such a question was religious and simple: justice emanated from God; it was exercised on earth by the King who delegated it to clerics.¹

Even today, there may be ready answers to this question, proposed by judges who are placed high in the judicial hierarchy and who can look back on a career of 40 years in office:

We need (...) thorough judges, unswayed by fashion, knowing the (professional) milieu, steadfast and quiet in their approach, concerned for the public good, and, in the end, not too concerned about a theoretical justification of their legitimacy.²

If such comfort can accompany national judges throughout their careers, the corresponding ease of mind will certainly stop at national borders. International judges, more particularly judges of the European Court of Human Rights (“ECtHR”) in Strasbourg, will, unless they are unshakeable or blind, have to face not only criticisms of how they render justice, but more deeply, the questioning of the very office they hold.

Judge, European Court of Human Rights.

I would like to thank my intern Anna-Lisa Jepsen for her assistance.

¹ ... to whom, as a sign of the mission with which he invested them, he handed over his robe. The togas worn by the judges are a vestige of those times; Garapon (1997), p. 79 et seq.

²Thuière (2004), p. 116.

G. Ravarani (✉)

European Court of Human Rights, Strasbourg, France

The legitimacy of the European judge³ has become the subject of a recurring political debate.⁴ It is because of a perceived lack of legitimacy that some politicians and governments have advocated leaving the European Convention on Human Rights (“ECHR”), repatriating decision-making power and getting rid of a court which subjects their State to international scrutiny in relation to their respect for human rights.⁵ As soon as a – moreover multilateral – international treaty is in place it has been said that “it is largely withdrawn from the grasp of its individual makers. This profoundly changes the relationship between law and politics. By agreeing to an international treaty, the parliamentary majority of the moment cements its position and puts it beyond the reach of any later majority”.⁶ If one accepts this logic, salvation may seem to lie in a re-transfer of the normative and control competencies to national authorities.⁷ One only has to look at what is going on in the European Union, where bitter trench warfare is being waged in order to stop more ground being ceded in matters of Union competence, and where considerable efforts are being made to recover national sovereignty.⁸

The most radical and, at the same time, the most intellectually honest solution would consist of an exit from the Convention system and the compulsory jurisdiction of the Court, which is what some advocate.⁹ A less radical approach could consist of remaining in that system while giving the last word to national

³In the following, “European judge” exclusively designates the judge of the ECtHR and not of the Court of Justice of the European Union (“CJEU”).

⁴Madsen (2016), p. 174: “Although bashing the ECtHR is not new, the generalization of the discourse across Europe and its application to very different human rights situations is quite novel”.

⁵What a contrast to some passages of the Preamble to the Convention: “[...] common understanding and observance of the Human Rights [...]”; “[...]common heritage of political traditions, ideals, freedom and the rule of law[...]”; “[...]collective enforcement [...]”.

⁶von Bogdandy and Venzke (2012), pp. 21, 22. See also Bellamy (2014), p. 1035, who reflects on the feasibility of a system where a mistaken judgment by an international court would be overturned by a consensus among the representatives of the democratic governments. Before Protocol no. 11, which established the permanent jurisdiction of the Court, entered into force, Article 46 § 2 of the Convention enabled the member States to recognise its jurisdiction for a limited period of time only.

⁷It is not as if the Court’s authority had always been uncontested and the challenges to its authority recent. See Madsen (2016), who shows that in the early days of the Convention, the big European States were reluctant to accept its jurisdiction and that its first judgments were not easily accepted.

⁸If the CJEU faces less criticism than the Strasbourg Court, it may be mainly because it interprets EU law and only indirectly interferes in national legislation. Another factor may be that EU law is first and foremost a technical, economic law that does not include societal choices. This is already changing with the CJEU’s jurisdiction under the Charter of Fundamental Rights. Most importantly, while the main task of the CJEU is to assist the national courts in their work by providing an abstract answer to the questions referred to it for preliminary rulings, the Strasbourg Court exerts a real *ex-post* control over decisions made by national courts and sometimes directly contradicts them. This is something much less easy to accept. It is not uninteresting to note that those States which have the greatest difficulties in playing the game of the European Union, whether they are reluctant to enter or are about to leave, are also highly critical of Strasbourg.

⁹Malcolm (2017), p. 143. See also, for a description of the political reactions to some politically sensitive cases, Madsen (2016), p. 170.

parliaments¹⁰ in controversial matters. Some suggest a solemn declaration of strong disagreement by national parliaments followed by a “dynamic” interpretation of Convention provisions by the parliaments themselves. In the same vein, some Member States openly disobey decisions with which they do not agree.¹¹ The problem with such solutions is obvious: the European judge would only have an advisory function and the national parliaments would have the real and ultimate power of decision¹²:

Unless we can be sure that infallibly wise judges can solve all problems involving fundamental values in an objectively correct way, we should do well to maintain some residual respect for democratic politics. If certainty is not to be attained in these matters, democratic debate and democratic decision-making may possibly supply us with the next best thing: legitimacy.¹³

On the other hand, unless a system based on a “concentration of powers” (*confusion des pouvoirs*) is introduced, as far as the courts are concerned, the problem is exactly the same: it is the task of the courts to interpret the laws, if necessary in a manner different from their reading by the legislator. The whole debate then takes place with reference to primacy in relation to the safeguarding of human rights. Who has the legitimacy to have the ‘last word’ – parliament or the judges?¹⁴ It seems as if ultimately, the legitimacy discussion is more about the role and position of the judiciary in general in matters relating to the safeguarding of human rights than about the fact that this control is attributed to an international court:

When a human rights regime is seen, decade after decade, to draw areas of decision-making away from the democratic legislatures and make them the preserve of the judges – especially when those judges are operating with an unstable mix of partly subjective principles and criteria – there must be serious cause for concern. To undermine democracy is, in a particular way, to undermine the very system of legitimate rule which human rights are intended to preserve.¹⁵

The ease with which the concept of legitimacy is extensively used does not reflect the complexity of this multi-faceted notion.

According to a dictionary of legal terms, legitimacy is the “conformity of an institution to a higher legal or ethical standard, perceived as fundamental by the community, which makes the authority of that institution morally and politically

¹⁰ ...or constitutional courts, see the Russian example.

¹¹ Cf. Donald and Leach (2016), p. 144. One has only to mention the problem of prisoners’ voting rights in the United Kingdom to measure the reality and relevance of this attitude. For a general picture of the increasing non-compliance with the Court’s judgments, Madsen (2016), p. 173.

¹² This is in open contradiction to Art. 46, § 1 of the Convention, which obliges States to abide by the judgments of the Court.

¹³ Malcolm (2017), p. 21.

¹⁴ Much depends on traditions: in the United Kingdom, for example, it is for parliament to have the last word, whereas in Germany, which has a strong and respected constitutional jurisdiction, the final say rests with the Federal Constitutional Court.

¹⁵ Malcolm (2017), pp. 123–124.

acceptable”.¹⁶ This rather complicated definition has the merit, however, of highlighting two aspects of legitimacy: on the one hand the “downward legitimacy”, that emanates from a higher authority, at the top level of the political structure, and, on the other hand, the “upward legitimacy”, the acceptance/adherence by the community.¹⁷ One must, therefore, at least distinguish between *legal legitimacy* and what one could call *legitimacy by assent*.¹⁸ There are many terms to express these realities; one can also distinguish between constitutive legitimacy and performance¹⁹ or normative legitimacy²⁰ or, alternatively, between original and utilitarian legitimacy.²¹

The distinctions can be refined: “constitutive legitimacy” refers, first of all, to the legality, the legal framework in which the judge exercises his power. The position that the judge occupies is designated by law. He or she is appointed by the authorities which are endowed with this mission by virtue of the underlying constitutional or constitutive rules that confer this power. Judges undoubtedly exercise a legal power, in most cases for life. They have to meet the litigants’ expectations of justice.

At the level of legitimacy by assent, litigants and other democratic powers evaluate the actions of the judge in terms of the expectations placed on them.²² This expectation has two aspects, one regarding the content of the decisions and the other regarding the means by which they are achieved. Do the judges’ decisions lead to the general feeling that they are rendering just decisions, and does the administration of justice work effectively?

Some identify a third aspect of legitimacy by looking at its *social dimension*: in contrast to the persons described above, who are actually dealing with justice (professionals such as judges and lawyers; those holding political power, or litigants, in the narrow sense of those involved in a trial) and who may or may not adhere to justice from personal experience, there are also those who have never actually had dealings with the legal system, who have never seen a court from the inside but do not hesitate to have a clear opinion on the legitimacy of the institution, either by personal conviction or influenced by different actors, political parties, the media, etc. This social dimension of legitimacy is the most difficult to comprehend.²³ While popular support is essential to the legitimacy of an institution, it is also the most volatile and the most susceptible to manipulation including, frankly-speaking, manipulation by populists.

¹⁶ Cornu (2016).

¹⁷ Fontaneau (2004), p. 205.

¹⁸ In French, a language I am more familiar with, I would have used the word “*adhésion*”.

¹⁹ Çalı et al. (2011).

²⁰ Donald and Leach (2016).

²¹ Bentham (1948).

²² Different concepts can be used to convey the underlying idea that the legitimacy by assent has a dynamic, normative (Donald and Leach (2016), p. 119) or performance (Çalı et al. (2011)) dimension.

²³ Donald and Leach (2016), p. 120.

It would be illusory to try to draw a sharp line between the different legitimacies – or rather the different aspects of the legitimacy – as outlined above. They are complementary and overlapping. Moreover, they are reflected in the individual judge as well as in the judicial power, both national and international. There seems to be no difference in essence between the legitimacy of the national and the international judge, but the questioning of the latter is much stronger and broader. As the present contribution is focused more specifically on the Strasbourg institution,²⁴ it appears useful, if one wants to examine the causes and possible remedies of the challenge of legitimacy from which the Strasbourg judge seems to be suffering, to first look at the legitimacy of the individual judge (Sect. 1), and subsequently at factors that are relevant for the Court's legitimacy more specifically (Sect. 2).²⁵

1 The Individual Aspect: The Judge

At the individual level, legitimacy issues may arise not only when judges begin their careers (Sect. 1.1), but also during their time in office where they have to strictly preserve their independence and impartiality (Sect. 1.2).

1.1 *Legitimacy Issues at the Moment of the Judge's Appointment*

Even more than the national judge, the European judge is criticised for lacking democratic legitimacy.²⁶ The criticisms are multiple and most frequently revolve around the “*democratic deficit*.”²⁷ This shows that some authors consider only elected parliaments to be legitimate in their power.²⁸ Oddly enough, the Strasbourg judges *are* elected (Sect. 1.1.1). Moreover, their election is conditional on the requirement that they are of high moral character and possess the necessary qualifications (Sect. 1.1.2).

²⁴ Whether the “Court” is to be considered an institution rather than a community of individual judges seems to be a matter of cultural perspective, see Garapon et al. (2008), p. 2.

²⁵ This is – of course – the program of a whole study that should be the subject of a book. The present contribution, much more modest, will confine itself to delivering some personal opinions and ideas. It can in no way engage the Court.

²⁶ The concept is extremely vague and difficult to define. It can be authoritarian and is focused more on equality than on liberty; see Ory (2017), pp. 36 and 59.

²⁷ Bellamy (2014), p. 1020; Donald and Leach (2016), p. 113.

²⁸ It has been stated that “properly speaking, democracy is a constitutional mechanism for arriving at decisions for which there is a popular mandate. But the Convention and the Strasbourg Court use the word in a completely different sense, as a generalised term of approval for a set of legal values which may or may not correspond to those which a democracy would in fact choose for itself” (Malcolm (2017), p. 44).

1.1.1 Election

The European Court of Human Rights has been established by a multilateral international treaty²⁹ and its judges are elected by the Parliamentary Assembly of the Council of Europe.³⁰ This should *a priori* suffice to give them, during their term of office, sufficient legitimacy.³¹

It may however be useful, in this context, to ask the question whether an election really is the only way to confer democratic legitimacy.

Leaving aside the problem of international judges, there are national systems where the election of judges is a reality. The system is most pronounced in the United States where, in about half of the States, judges are elected and, in a number of them, directly by the citizens. A trial judge from Pennsylvania described the problems he faced: elections are held there every 10 years. Candidates have to campaign, to find a party that supports the campaign, raise money. The biggest donors in this type of elections are lawyers themselves who expect subsequent returns. Furthermore, when campaigning the judges must take a stand on issues of interest to voters. Are they for or against the death penalty, abortion, etc.³² If an elected judge subsequently departs from the positions expressed, his or her legitimacy may suffer.

Even for politicians who are in office following a democratic election, legitimacy is a rare asset, a volatile perfume: what is the legitimacy of the one who, triumphantly elected for 5 years, finds himself a year later at the lowest position in the polls? The problem therefore does not seem to be that of legitimacy at the time of the investiture, but the difficulty of preserving it throughout the mandate. Here there is a singular resemblance between all those who exercise a public mandate, whether elective or otherwise: to keep, throughout the exercise of the mandate, the adherence of citizens. Of course, were he or she to seek legitimacy by assent day after day, no politician could any longer afford to take an unpopular measure, and no judge could hand down a judgment that displeases.

Others would like to justify the legitimacy of the judge precisely in opposition to political power and invite people “to abandon the old prejudices limiting its legitimacy”.³³ They consider the judge as a bulwark against invasive political power which – even if the latter is democratically legitimate – by such means as interpretative and consequently retroactive laws or by amnesties, constantly tries to mistreat the rule of law. Even without an elective mandate, the judge is then the protector of the individual rights of citizens, a kind of counter-power, the “sole interlocutor

²⁹ Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950.

³⁰ ECHR, Art. 22.—As far as the role of the Parliamentary Assembly is concerned, see Donald and Leach (2016), p. 126.

³¹ Çali et al. (2011), p. 4, *sub* 4.1.A.

³² Glazer (2003), p. 53 et seq.

³³ Pescatore (2000), p. 345.

independent of political power”, exercising an “irreplaceable function in the defence of democratic values”.³⁴

It has indeed been shown that the verdict of the ballot box is not the only standard of legitimacy. A power is considered fully democratic only if it is subjected to concurrent and complementary tests of the control and validation of the majority expression. One of the main tests resides in the judicial control of the activity of the legislator. The judges benefit from the legitimacy of impartiality, which arises from the rules laid down by the constitution and organic laws.³⁵

It is certainly not an exaggeration to talk, in the context of the absolute sovereignty of an elected parliament, of the people or of the nation, depending on the constitutional system, of the “tyranny of the majority”³⁶ and, moreover, of the *majority of the moment*.³⁷ That shouldn’t be misunderstood. The question is not about the legitimacy of a parliament that can, in principle, by a majority vote, change any law and even change a certain jurisprudential interpretation of an existing law. But are the powers of parliament boundless? In a regime of separation of powers, the legislature is only one among the constitutional powers and it is also subject to the rule of law. It must respect the constitution and international treaties. If the *majority of the moment*, for example, introduces a law that establishes as a general rule and without exception expropriation without compensation, something which the constitution prohibits, this law would most probably be annulled by the constitutional judge and, if that State were a member of the Council of Europe, it would have violated Article 1 of Protocol no. 1 to the ECHR.³⁸ If this example seems too farfetched, one could instead refer to the laws often enacted in a hurry and after public pressure following a terrorist attack.

Democracy – at least liberal democracy – is more than simply a majority vote. There must also be a protector of the *minority of the moment*. This has nothing to do with minority groups, (ethnic, religious, etc.), but it relates to those who are not represented by the majority in parliament. The problem is not peculiar to international courts; it is posed in similar terms – in any case concerning the limitation of the “sovereignty” of the parliament – for national powers other than parliament, in particular constitutional courts. Democracy is also about checks and balances.

The fundamental error seems to lie in the juxtaposition or even opposition of parliamentary and judicial legitimacies. They are obviously not at the same level

³⁴ Pescatore (2000), p. 348.

³⁵ See, Rosanvallon (2008).

³⁶ Cf. Donald and Leach (2016), p. 132.

³⁷ ...which can even trigger a change of a Constitution. In Switzerland, by a referendum of 9 February 2014 where the “yes” obtained a 50.3% majority, the federal authorities were obliged to enact a constitutional law that limits “mass immigration”. What would happen if 0.4% of the population changed their minds? The Swiss Constitution would have to be changed again...

³⁸ Expropriation without compensation is not *per se* in violation of the Convention, but is a strong indicator of the disparate allocation of burdens under Article 1 of Protocol 1; see, among many others, *Sporrong and Lönnroth v. Sweden* [GC] 23 September 1982, Series A No. 52, and *Scordino v. Italy (n° 1)* [GC], application no. 36813/97, ECHR 2006-V.

and pursue different logics. They are simply complementary and should not be weighed against each other.³⁹

1.1.2 Qualifications

It has to be admitted that some, even though they accept the jurisdiction of the ECtHR, have doubts not only about the adequacy of the appointment system for Strasbourg judges but, above all, about the qualifications of those appointed. A study conducted in 2010 among politicians, judges and lawyers on the legitimacy of the ECtHR shows that national judges in particular are very sceptical in this respect.⁴⁰ All Strasbourg judges should be selected according to a rigorous process ensuring their legal skills and moral quality.⁴¹ An election by the Parliamentary Assembly, if it confers a certain “democratic” legitimacy, does not, however, guarantee these qualities. The Parliamentary Assembly is a political body that is not *a priori* equipped for selecting judges on the basis of their scientific skills. It is true that there are some safeguards – at the national⁴² and European⁴³ level – but the members of the Parliamentary Assembly are totally free to choose “their” candidate among the three who have been selected in preliminary proceedings.

Beyond the imponderables of the selection process, candidates and potential judges should themselves be sure to have the necessary scientific baggage, judgment technique and ability to work in a team before applying in Strasbourg.

³⁹ Unfortunately, some statements by the Court could be understood as if the Court itself also weighed the two legitimacies against each other. See e.g. *Draon v. France* [GC], application no. 1513/03, ECHR 2006-IX where it states “The national authorities have direct democratic legitimisation and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions [...] In matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight” (§ 108). Such a statement explains and justifies the margin of appreciation mechanism (see below). However, it seems excessive to suggest that judges would not enjoy “democratic” legitimacy.

⁴⁰ Çalı et al. (2011), p. 18, *sub* 6.1.A.

⁴¹ ECHR, Art. 21, § 1: The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence.

⁴² When selecting their three candidates, States should ensure that their national procedure is fair and transparent, for example by issuing public and open calls for candidates. All candidates must have appropriate legal qualifications and experience and must have an active knowledge of either English or French and at least a passive knowledge of the other language. To help ensure candidates are fully qualified, an international panel of Council of Europe experts offers governments confidential advice on potential candidates before the final list of three is sent to the Assembly.

⁴³ Once the Assembly has received the list of candidates, a special committee of parliamentarians with legal experience interviews each of the three in person and scrutinises their CVs, in a standardised format, before recommending whether or not to accept the list – in other words, whether it believes all three candidates are sufficiently well qualified to do the job. If so, it indicates which candidates it believes are the strongest. If not, States are asked to submit a fresh list. The Parliamentary Assembly is not bound by the recommendation of the committee.

1.2 *Legitimacy Issues During the Exercise of Office*

The judge's legitimacy during the exercise of his or her office is largely conditioned on certain essential qualities,⁴⁴ first independence and impartiality, which are closely interrelated (Sect. 1.2.1), and secondly, the judge's professionalism when examining and judging a case (Sect. 1.2.2).

1.2.1 *Independence and Impartiality*

A major problem that directly affects the position and indirectly the legitimacy of the judge is that of his or her *independence*. How could judges at the mercy of another power, international or national, and unable to make their decisions in complete independence, be legitimate in the eyes of parties? While independence is an indispensable asset at the national level, it is no less so at the European level. The major additional issue at this level is the independence of the European judge from the State to which he or she belongs, both during the term of office and afterwards. He or she must be free from any attempted influence by the national authorities and should have no fear of reprisals of any kind whatsoever when taking part in decisions which displease the latter. A step towards greater independence was achieved with the removal of the possibility of re-election of judges accompanied by an extension of their single mandate to 9 years. A 9-year term may seem long. However, it does not prevent a significant turnover among judges: on average (47:9) each year five judges come to the end of their mandate and are to be replaced by five new judges. This may of course pose a challenge to the continuity and coherence of the case-law, which in turn may impact on the judges' legitimacy.

Unfortunately, there have been and there are extreme cases where judges appear not to be welcome when returning to their country during their term of office or on the expiry of their mandate. More subtly, some see a brake on their career when they return. One of the possible means to ensure genuine independence, both during and after the term of their office, would be the assurance, legally provided for, of being able to return to their original position at the end of the term. This would be useful for those enjoying a status (judges, professors) but not for those working in the private sector, mainly practising lawyers.⁴⁵ But one only has to look at the current composition of the Court to measure how many judges would benefit from such a proposal. It is true that such a system would imply, for certain States, the modification of their constitution, but constitutions have already been modified for lesser reasons.

That being said, it should be stressed that independence and impartiality are closely interrelated as the former is not a goal in itself but merely a condition for guaranteeing the latter.

⁴⁴ For an exhaustive catalogue of the virtues of the judge, see Garapon et al. (2008).

⁴⁵ Çalı et al. (2011), p. 21 s., *sub* 6.1.C.

In countless judgments, the Court has established a very comprehensive catalogue of what is required to ensure the fairness of proceedings and in relation to one of its core aspects, the objective and subjective *impartiality* of the national judge.⁴⁶ Does the obligation of impartiality of the European judge differ in any way from that of the national judge?

Maybe not in principle, but it presents itself in a different form. The fact that only States are respondents in cases before the ECtHR certainly plays a role. Moreover, the Convention provides for the national judge participating in the examination of cases concerning “his” or “her” country.⁴⁷ The compulsory presence of the national judge in the Chamber or the Grand Chamber under the Convention is certainly intended to avoid judgments which are “disconnected” from national legal systems. However, it may trigger other problems relating to the necessary distance from national institutions and even relating to impartiality, at least of the objective kind.

It is also undeniable that in the different member States of the Council of Europe human rights standards are not uniform. It is understandable that authorities from countries that have joined the Council of Europe more recently show some scepticism towards judges originating from founding countries and that, conversely, the authorities of those latter countries show some distrust of judges coming from more recent democracies. It cannot be ignored that, in an institution comprising 47 member States, each with its own legal and political history, the attitudes of national judges and European judges towards the institutions of their respective countries may be very disparate, some having *a priori* confidence in their institutions and others a correlative mistrust.⁴⁸ This could become problematic if judges from countries in which there is “primary” trust in their respective domestic institutions, called upon to assess the situation of a country where such trust does not exist, would do so with reference to the standards they are familiar with and if, conversely, judges from countries where there is a deep scepticism towards institutions, called to appreciate the functioning of the institutions of a country where such confidence reigns, were to apply their usual standards.

Concerning the States in respect of which they have been elected, judges must furthermore resist a dual temptation, namely, on the one hand, that of trying to “protect” their State and avoid at all costs finding a violation, and on the other, that of wanting to “lecture” or to “educate” their national authorities.

In the end, however, the requirements with regard to the European judge do not differ fundamentally from those to which the national judge is subject: he or she must preserve “a fair distance” (*une juste distance*) from the case in hand.⁴⁹ Such a

⁴⁶ See the Court’s guides on fair trial (civil limb and criminal limb), published on the Court’s website and online available at http://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf and http://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf.

⁴⁷ Article 26 § 4.

⁴⁸ Cf. Nussberger (2018).

⁴⁹ Commaret (1998), p. 262. The word “distance” should not be misunderstood. It does not mean that the judge should not be interested in the case, quite to the contrary. If he or she should not take the matter at stake “personally” and remain autonomous, without any pressure and without bias, he

distance is even more difficult to maintain where the national judge, who has opined and voted in the Chamber, is called to sit a second time, in the same case, in the Grand Chamber. While the presence of the national judge is indispensable because of his or her knowledge of the legal system of the State in question, the authors of the Convention could have established a system in which, when the national judge sits in cases concerning “his” or “her” country, he or she would have only a consultative vote, at least in the Grand Chamber. Given, however, that the presence of the national judge is provided for in the Convention itself, no change of the relevant provisions can be realistically envisaged.⁵⁰

1.2.2 Professionalism

The legitimacy of the Strasbourg judges is dependent on their day to day work. It is through showing professionalism, reasonableness, through giving acceptable and accepted judgments that they deserve legitimacy, on a daily but never acquired basis. In order to maintain their legitimacy, they must deliver judgments of high quality based on rigorous reasoning.

Judicial power will not be accepted if it appears arbitrary. Judges will appear arbitrary – whatever the mode of their appointment, their qualifications *a priori* or their position in the hierarchy – if they do not try to comply with the obligation to thoroughly justify their decisions and underpin them with rigorous reasoning. This applies to the individual judge as much as to the court they belong to if judgments are given by a panel. It is the judges’ individual duty to cooperate in order to collectively provide convincing legal reasoning.⁵¹ The litigant – and courts called upon to apply case-law – have an unconditional right to a judgment that clarifies the path

or she should at the same time feel concerned (see Garapon et al. (2008), who identify “*les vertus de distance* (*impartialité, renoncement, indépendance, désintéressement, effacement*)”, *op. cit.*, p. 20).

⁵⁰ At the level of the Grand Chamber, where the national judge sits a second time, the problem could also be avoided if the Court had two judges per country, in which case in the Grand Chamber, it would be the national judge who did not sit at Chamber level that could sit. Given current political and budget difficulties, it is hardly realistic to formulate such an idea... Beyond this wishful thinking, it should be noted that there are examples where a national judge changed his mind when sitting in the Grand Chamber (see e.g. the concurring opinion of Judge Bratza in *Al-Khawaka and Tahery v. United Kingdom* [GC] (application nos. 26766/05 and 22228/06, ECHR 2011-VI) highlighting the judicial dialogue with the national court that had taken place since the judgment of the Chamber).

⁵¹ Of course, it depends on the various judicial traditions if one considers a judgment as a collective product or the sum of individual opinions. There is every reason not to exclude from this obligation the authors of dissenting opinions.

of the judges' thinking.⁵² It is in this sense that judges exercise a duty as much as a power. Their legitimacy, the foundation of their status, comes at this price.⁵³

Rigorous reasoning presupposes an *accurate knowledge of fact and law*. For the European judge, these requirements have a particular connotation.

The knowledge of the law is not limited to that of the Convention and the case-law of the Court, but extends to the national – and potentially international – law at issue in a given case. It is precisely this requirement which makes it indispensable for the judge elected in respect of a State to be present in the composition of the Court called upon to judge an application against that State in Chamber and Grand Chamber formations.⁵⁴

Knowledge of the facts of the case is as indispensable as that of the applicable law. Here, the judge must, so to speak, square the circle. He or she is – also – judge of the facts even if he or she has only very limited means to establish them. He or she must, however – and this may seem paradoxical at first sight – not be over-zealous in trying to establish the facts independently and at times in contradiction with the facts as found by the national courts. There remains, of course, the case where a national court grossly distorts the facts but, in general, the Strasbourg Court is not a court of first or of fourth instance.

The fact that control of respect for human rights by national authorities is exercised by non-national judges certainly does not facilitate matters. There is considerable mistrust of this aspect of the Convention system, especially as control of the absolute respect for human rights in a given country implies a thorough knowledge of national institutions, which are often disparate and complex. If the distinctive feature of the work of Strasbourg judges lies in the fact that they are called upon to judge situations in countries of which they are not nationals, this is exacerbated by the fact that they exclusively have to deal with States as defendants and not individuals. It is true that every constitutional judge is called upon to deal with State organs and that even ordinary judges are in charge of cases against the State to which they belong (e.g. in matters of State liability or in administrative disputes). However, the fact that it is a non-national judge who judges the respondent State may not be that easy to accept, especially at a time when nationalism and Euroscepticism are getting stronger and when populists see the solution in the undiluted sovereignty of the national State.

If the legal status and performance of individual judges are central to the assessment of their legitimacy, the same is true, more or less, with domestic judges who have to show the same qualities to enjoy such legitimacy. It cannot be overlooked, however, that the Strasbourg judge is member of a European Court that has a number of distinctive features, each of them having an influence, not so much on the legitimacy of the individual judge but on that of the Court.

⁵²The bar is generally favourable to this request: “What the judges do not really seem to understand is that any judicial decision, whatever it is, must be well motivated to be understood and consequently accepted by the litigant”, words attributed to the president of the bar *Canellas* by *Jean-Jacques Barbiéri* (Barbiéri (2004), p. 82). In the German language, there is a word that apparently has no equivalent in English or in French: the reasoning of the judge must be “*nachvollziehbar*”.

⁵³Théron (2004), p. 100.

⁵⁴Art. 26, §§ 4 and 5 ECHR.

2 The Collective Aspect: The Court

Entrusted with the duty to safeguard human rights and fundamental freedoms at the European level, the Court faces specific challenges that have a direct and weighty influence on its legitimacy, in its institutional and “by adhesion” aspects considered together. The far-reaching mission of the Court (Sect. 2.1) imposes specific duties (Sect. 2.2).

2.1 *A Far-Reaching Mission*

Whatever one might say, the Strasbourg Court is a driving force for the development of the scope of human rights (Sect. 2.1.1).⁵⁵ Given that its judgments enjoy a scope that goes far beyond the individual case decided (Sect. 2.1.2), it has to handle the development technique with care.

2.1.1 Developing the Human Rights

Does the Strasbourg Court have the legitimacy to develop human rights and fundamental freedoms? It emerges very clearly from the aforementioned study conducted in 2010 on the perception of the ECtHR by politicians, judges and lawyers that they do not consider legal or institutional legitimacy as an exclusive aspect of the legitimacy of the ECtHR. However they expect the Court to promote three substantial values or to follow three logics:

- 1) A logic of enhancement of capacities and duties that belong primarily to the domestic realm (i.e. supranational human rights courts help States better protect human rights, better enforce democracy);
- 2) A logic of prevention of State failures, (i.e. supranational courts act as an external corrective to domestic biases, protecting disempowered individuals before the domestic polity);
- 3) A logic of harmonization of human rights standards, (i.e. forging common standards of human rights across countries through interpretative (non-coercive) means ensures equality of application.⁵⁶

Do European judges have the right to engage in such an exercise?⁵⁷ In doing so, do they encroach on the sovereignty of the member States of the Council of Europe?

⁵⁵ It has been called the “de facto Supreme Court of human rights in Europe” by *Mikael Rask Madsen* (Madsen (2016), p. 142).

⁵⁶ Çalı et al. (2011), p. 8, sub 4.1.B.

⁵⁷ While the Preamble of the Convention speaks of the maintenance as well as of the further realisation of human rights, there is no consensus on whether this is the task of the ECtHR or other bodies of the Council of Europe. Article 19 of the Conventions provides: “To ensure the observance of the

Can they stand back and consider, by analogy with the words of a United States Supreme Court Justice, that the Convention is “dead”?⁵⁸ Does the Court, according to Montesquieu’s theory which saw in the judge the “*bouche de la loi*” (mouthpiece of the law),⁵⁹ have to refer any question of interpretation of an unclear law to the legislator? This idea has been largely abandoned, not only because it would hardly be practicable with the well-known phenomenon of legislative inflation, but also because legislators very often voluntarily unload onto the courts the interpretation of concepts that they intentionally formulate in a vague way. The Convention text is a prominent example of this method.⁶⁰ In fact, law-making is an inevitable aspect of judicial interpretation. It is an intrinsic element of adjudication and it is not as such *ultra vires*.⁶¹

engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights[...]”. The Court has always understood the distinctive nature of the Convention as a human-rights treaty to compel a flexible and evolutionary teleological interpretation of its open-textured terms if the Convention is not to become progressively ineffective with time. It sees itself endowed with a duty to “develop” the substance of the rights themselves. Some doubt that this is the Court’s task: “The ‘*développement*’, or the ‘further realisation’, of human rights was an additional task which the Council of Europe set for itself – not for the Court as such. The task of the Court was to implement the actual rights defined in the Convention. In so doing, it was entitled to update the meanings of particular terms when those meanings had clearly changed over time. The ‘object and purpose’ of the Convention authorised that much evolutive interpretation – but, it must be emphasised, no more than that.” (Malcolm (2017), p. 75). However, even those who harshly criticize the democratic legitimization of judges to further develop human rights provisions opine that to be followed and identified with, the law must also be, in certain crucial respects, “the peoples’ law’ rather than merely ‘lawyers’ law’. As a result, the judiciary need to be in touch with the changing social circumstances or mores of those whom these judgments affect if they are not to make arcane, arbitrary, or unreasonable demands of citizens.” (Bellamy (2014), p. 1027. Of course, this mechanism is also criticised: “There are, it seems, no clear principles behind the Court’s use of ‘consensus’. Sometimes a very small majority suffices to establish it; sometimes a large one is declared insufficient. In some cases a survey of the existing situation among the member States is used; in others, appeal is made to an ‘emerging consensus’; beyond that, the principle can sometimes be extended to, or overridden by, an ‘international trend’, invoking conditions outside Europe, though on the basis of no statistical survey at all. Usually the consensus is about legal conditions and policies; sometimes, when it suits the Court, it can focus on scientific or philosophical issues instead. And the degree to which the consensus affects the margin of appreciation is itself quite variable”, Malcolm (2017), p. 59).

⁵⁸ See the speech delivered on 28 January 2013 by Justice Antonin Scalia of the U.S. Supreme Court at Dallas-based Southern Methodist University, stating that the U.S. Constitution is “not a living document” and that it is “dead, dead, dead”.

⁵⁹ Montesquieu (1777): “The judges of the nation are only the mouth that speaks the words of the law, inanimate beings, who cannot moderate either their strength or rigour”.

⁶⁰ “It also seems likely that in several instances, governments have been happy to “outsource” politically difficult problems to the Court in order to obtain an international judicial imprimatur for unpopular legal or policy reforms. Furthermore, the Court may reasonably be said to have contributed to “unifying” CoE member states, and thus to the realization of the broader objectives of the Council of Europe. [...], thereby facilitating political and economic integration processes”, Shany and Noam (2014).

⁶¹ von Bogdandy and Venzke (2012), p. 473. The German Federal Constitutional Court – whose legitimacy is beyond doubt – confirms that judicial law-making is part of the competence of

Indeed, it does seem that the real added value of the European judge's action in the field of the protection of human rights, compared to that of the national judge, is that he or she can render decisions which set standards in this respect with regard to all Member States.⁶² Whatever else one may say,⁶³ it seems obvious that his or her legitimacy partly stems from this value or, more precisely, these added values:

First, there is value identified at the individual level where the ECtHR has an impact on the individual. Second, there is the value at the global level where the ECtHR operates as a setter of minimum standards or strives to achieve solutions to particular global problems. Third, there is a value at the national level where the ECtHR has relevance for national law, policy or practice or the operation of national institutions.⁶⁴

The authors of the aforementioned study speak of “legality-plus” legitimacy.⁶⁵

If one consequently wants to start a discussion on the legitimacy of European judges insofar as they protect human rights, it is not a matter of discussing whether they have the right to do so but only whether, in doing so, they fall below what is expected of them in some cases or inflate protection in others. Either or both of these attitudes are likely to erode their legitimacy.

The number of those who believe that European judges remain too timid when it comes to the development of human rights is far from negligible. However, those who believe that, on the contrary, they exceed their mission and stray into real judicial activism are more virulent and audible.⁶⁶ This is why the following paragraphs seek to address the latter concerns. It should be noted that the “judicial activism” of the Court, via the “living instrument” concept,⁶⁷ is reflected not only in pushing the limits of existing rights⁶⁸ but also in the apparent discovery of “new rights” that are

supranational and international courts. It sees judicial law-making particularly warranted when it makes programs concrete (in the sense that it implements the normative project of a treaty), when it fills in legal gaps and when it solves contradictions. On the other hand, the said court considers judicial law-making likely to be *ultra vires* when it goes against what is clearly stated in the text, or when it creates new rights or obligations without sufficient justification in the relevant positive law. Judicial law-making is illegal in particular, according to the German court, if a supranational or international court lays new normative foundations or structurally alters the fundamental balance of power (von Bogdandy and Venzke (2012), p. 473 on a judgment by the German Federal Constitutional Court of 6 July 2010, 2 BvR 2661/06).

⁶² See below, Sect. 2.2., The scope of the Court's Judgments.

⁶³ Amos (2017), p. 767, who is of the opinion that the question of the value of the ECtHR must be distinguished from the question of its legitimacy.

⁶⁴ Amos (2017), pp. 763–785. In this context, the impact of Protocol no. 16 to the Convention, which endows the Court with a kind of “constitutional” role, should not be neglected.

⁶⁵ Çalı et al. (2011).

⁶⁶ Those who are hostile to the Court criticise it for interpreting the provisions of the Convention in an over-extensive manner, the biggest culprit in this respect being Article 8.

⁶⁷ It is interesting to note that the study on the acceptance of jurisdiction by legal professionals underlines that the professionals do not really challenge this instrument, Çalı et al. (2011), p. 12, *sub* 5.2.

⁶⁸ For example, the development of notions of torture, inhuman treatment and degrading treatment (Article 3) where the threshold for finding torture has been significantly reduced over the years and some treatments that were previously not subjected to criticism are now considered degrading

not rooted in the Convention and which were not in the minds of its framers.⁶⁹ In the context of the extensive interpretation of the provisions of the Convention, the reference in numerous judgments and reliance on *soft law* has to be mentioned too.⁷⁰ In contrast, although often the subject of heavy criticism, the Court's practice of conferring an *autonomous meaning* on the provisions of the Convention which do not necessarily correspond to the categories of national law appears to be vital for the Convention. It would be too easy, for example, for a State to classify all sanctions as administrative in order to immunise them from the guarantees of Article 6.

It is not the purpose of this paper to provide an inventory of extensive interpretations, nor to provide a critique nor an apology. The purpose is instead to address the problem of extensive interpretation – assuming it exists – from the viewpoint of legitimacy. The dilemma is obvious:

Mahoney's insistence that there is a need to maintain a balance between activism and passivism in the system of the ECHR (...) appears to be completely justified when it comes to maintaining the Court's legitimacy at an appropriate level. However, the point there is that limiting the judicial activism of the ECtHR could entail stagnation for the entire system. The ECtHR was not established so that it could merely confirm the compliance of the member States' decisions. Therefore, the ECtHR faces a constant dilemma: the development and protection of human rights law requires activist case law, yet excessive activism can undermine one of the greatest achievements of the ECHR system, namely its effectiveness.⁷¹

Is the solution not one of striking banality: judges, like everybody else, should be and remain reasonable? Too much is always too much, too little too little.

2.1.2 The Scope of the Court's Judgments

Strictly and technically speaking, a judgment of the Court is rendered *inter partes* and it binds only them. The Convention does not confer an *erga omnes* effect on a judgment. Article 46 § 1 of the Convention clearly provides that the High Contracting parties undertake to abide by the final judgment of the Court "in any case to which they are parties".

treatments (see e.g. *Bouyid v. Belgium* [GC], 28 September 2015, application no. 23380/09; *Kraulaidis v. Lithuania*, 8 November 2016, application no. 76805/16).

⁶⁹ Examples for Article 8: *S. and Marper v. United Kingdom*, 4 December 2008, application nos. 30562/04 and 30566/04, concerning the retention by the authorities of fingerprints and DNA samples taken from the applicants during criminal proceedings which did not result in their conviction; *K.U. v. Finland*, 2 December 2008, application no. 2872/02, about the publication of an advertisement of a sexual nature concerning a child on an Internet dating site; *Fadeyeva v. Russia*, 9 June 2005, application no. 55723/00, about environmental standards.

⁷⁰ Soft law can certainly be cited to support certain binding provisions, but legitimacy problems arise where European judges arise when they base a decision exclusively or mainly on such a non-binding text, thus transforming soft law into hard law.

⁷¹ Wiśniewski (2016), pp. 103–110, citing Mahoney (1999), p. 78. See also Gomulowicz (2014), p. 139: "The relationship between truth and justice is perhaps the most difficult problem relating to the essence of judicial practice, and it is clear the this issue cannot be resolved without judicial activism".

However, even this technical aspect must be considered in relative terms. Firstly, on the basis of Article 46 of the Convention, the Court sometimes issues recommendations to a respondent State, indicating how the violation it has pronounced might be remedied by changes to national legislation. Secondly, the last sentence of Article 37 paragraph 1 of the Convention provides, as an exception to striking out a case where the applicant no longer intends to pursue the case, that the Court may nevertheless continue the examination of the application if respect for the human rights guaranteed by the Convention and its protocols so requires. This provision allows the Court to look at the interest of human rights beyond the individual case and to make a judgment in the general interest, regardless of the individual case.⁷² Finally, the pilot judgment procedure, approved by the Convention Member States, allows the Court to rule by general disposition in cases of recurrent violations and systemic deficiencies. If its judgment is given following an individual application, it has a general scope that goes far beyond the individual case. The very fact that pilot judgments are focused on identifying systemic malfunctioning in the domestic legal order and on the indication of appropriate general remedial measures normatively extends the binding effect of the Court's judgments and changes their legal nature, accentuating the Court's constitutional function. Pilot judgments have individual and general legal effects in the domestic legal order. They extend the individual application procedure by introducing elements normally found in the judicial review of legislation. The pilot judgment can, in the words of one commentator, be considered:

an innovative strategy of imposing the Court's judicature on the domestic legislative process. The Court generalizes the legal arguments of its judgment beyond the individual case by issuing a programmed lawmaking obligation to the domestic legislature. This judicial lawmaking by requesting domestic legislation is a remarkable judicial strategy of compliance or internalization, which is able to substitute the lack, in doctrinal terms, of direct effect of the convention and the lack of *erga omnes* effect of the Court's judgments in the domestic legal system.⁷³

A really thorny problem is the dichotomy between the individual justice that the ECtHR is called upon to render and the scope of the Court's judgments that go far beyond the individual case. It is indeed undeniable that, beyond the technical aspects, the judgments of the Court enjoy the authority of "*res interpretata*", which confers on the Court a constitutional jurisdictional role. If in the judgment in *Hirst*⁷⁴ the Court had concerned itself only with the prisoner in question, the result might have been different and the case would not have whipped up so many waves and unleashed so much passion.

⁷² One could also refer, in this context, to Article 35, § 3 b) which empowers the Court to declare inadmissible an application if the applicant has not suffered a significant disadvantage, 'unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits'.

⁷³ Fynys (2012), p. 329 at 331 and 332.

⁷⁴ *Hirst v. The United Kingdom* (No. 2) [GC], 6 October 2005, application no. 74025/01.

It must also be borne in mind that if the mission of the Court were limited to rendering purely individual justice, its legitimacy would be certainly and seriously undermined as, because of the accumulated, daunting backlog, such justice which may be of limited use to the individual litigants who may have had to wait many years to see their case addressed by the Court. This too has attracted much comment:

Against the background of an overwhelming number of applications, the current debate regarding its core functions raises the question of whether the Court should engage in ‘constitutional’, in contrast to ‘individual’, adjudication. The ‘constitutional’ concept highlights the Court’s function in a pan-European standard setting. In this respect, individual cases are the material from which legal arguments about what the concrete provision of the Convention mean are extrapolated and the general content of the legal order provided by the Convention is developed. According to this conception, it is the lawmaking role that should be seen as the Court’s main *raison d’être*.⁷⁵

An unmistakable additional element which demonstrates that the value of the Court’s judgments goes beyond individual justice can be found in Protocol No. 16 which entered into force on 1st August 2018. It entrusts the Grand Chamber of the Court with the task of issuing advisory opinions following a “preliminary reference” by superior national courts.⁷⁶ This will inevitably, at least in part, lead to abstract questions.⁷⁷

The conclusion is quite straightforward: not only is limiting the effects of the Court’s judgments to individual cases undesirable, it is simply technically impossible.⁷⁸

That being said, can the European judge disregard the individual case in order to deliver a general message about a pressing human rights problem that the individual case, strictly speaking, does not provide him or her with the opportunity to tackle?⁷⁹ Here, a red line should not be crossed. Even if, as underlined above, the effects of

⁷⁵ Fynys (2012), p. 330, summing up the analysis by Wildhaber (2002) and Harmsen (2007).

⁷⁶ The right to ask such questions will be limited to the highest courts and tribunals designated by the States which will be parties to Protocol no. 16 (see Art. 1 and 10 of the Protocol). As the opinions of the Court will be advisory, they will not be binding on any court, even not on those which will have referred the question. However, here again, the opinions will enjoy, at least, a persuasive authority which will be unlikely to be limited to the courts having asked for the opinion and even to the authorities of the States that will be parties to Protocol no. 16.

⁷⁷ ...notwithstanding the request that an advisory opinion may only be sought in the context of a pending case before the requesting court. In that sense, the relationship between a concrete case and an abstract response seems to be quite similar to the preliminary ruling system before the CJEU.

⁷⁸ On the other hand, in some very specific circumstances, it happens that the Court stops dealing with individual cases if the legal issue has been clearly defined in a previous pilot judgment and if the issue is about the failure, by the domestic authorities, to take general measures following the said judgment rather than individual measures of redress, see *Burmych and others v. Ukraine* [GC], 12 October 2017, application nos. 46852/13, 47786/13, 54125/13 et al.

⁷⁹ Cf. *Radomilja and others v. Croatia* [GC], 20 March 2018, application nos. 37685/10 and 22768/12.

judgments⁸⁰ exceed the scope of the individual case, judges should be aware of the fact that it is the exclusive privilege of parliaments and governments to be able to seize themselves of general questions and provide normative solutions. Legislative initiative exclusively belongs to the political power. The iron rule is that judges cannot and must never take up a case or a problem on their own initiative or use the individual case as a pretext for delivering a message which has little or nothing to do with the individual case. Were judges to do so they would be acting *ultra* or rather *extra petita* in the true sense of the expression and would thereby lose their legitimacy.

2.2 *Specific Duties*

The far-reaching mission and powers which the Court enjoys impose specific obligations, be it on the organisational level, where it must endeavour to show efficiency despite very limited means (Sect. 2.2.1) or on the institutional one, where it must respect the member States' primary responsibility in the safeguard of human rights, the Court's role being a subsidiary one (Sect. 2.2.2).

2.2.1 *Efficiency*

The Strasbourg Court has developed substantial case law on the reasonable time within which justice must be rendered by domestic courts and it has found an exceptionally large number of violations in this field.⁸¹ It might look strange that the Court does not appear to apply the standard of reasonable time when delivering its own judgments. Unfortunately, reality speaks a different language. In this context, it has to be underlined that, compared to the magnitude of its task, the Court is severely underequipped. The backlog is worrying and the increasing strictness when it comes to assessing the admissibility of applications at the level of introduction of applications⁸² (Rule 47) leads to discontent among many lawyers. This increased strictness and the "industrial" processing of inadmissible cases is undoubtedly the result of the incessant pressure to manage the case-load to which the Court is subjected. While such draconian procedures have reduced a stock of cases that previously exceeded 160,000 cases to about 60,000, the solution is cyclical while the problems are structural. In reality, the Court lacks the means to deal with the number of cases it receives in a timely manner and if it were to apply to itself the standards of formal admissibility of applications without undue severity in the light of what it requires

⁸⁰ ... by the way, also of national judgments, above all of constitutional or national administrative courts.

⁸¹ See the Court's guides on fair trial (civil and criminal limbs), cited above.

⁸² Article 47 of the Rules of the Court, amended on different occasions (17 June and 8 July 2002, 11 December 2007, 22 September 2008, 6 May 2013, 1st June and 5 October 2015).

from national courts – in this context the Court’s case law about “excessive formalism” depriving applicants of their right of access to a court, thus violating Article 6 of the Convention should be recalled⁸³ – the backlog would be an even more serious problem.⁸⁴ As justice delayed is justice denied, a significant backlog whose origins are structural causes general dissatisfaction which, in the long term, may erode the Court’s credibility and legitimacy.⁸⁵

One could, of course, consider increasing the number of judges, equipping them with personal staff, as is the practice at the Court of Justice of the European Union, or recruiting more lawyers. In order to substantially increase the ability of the Court to examine cases and hand down judgments in a timely manner, no bounds are placed on the imagination and on the most foolish of dreams.⁸⁶ However, are these “dreams” really that crazy? If one really wants to prevent the Court from getting bogged down in business and becoming the victim of its “success”, should it not be provided with the necessary means to enable it to carry out its external supervision properly?

2.2.2 Subsidiarity

What should be ultimately the Court’s main focus in order to remain within the limits of the legitimate exercise of its power? Here the very specific nature of its role clearly distinguishes it from a national court: the Strasbourg Court has a subsidiary role in relation to the national judge as regards the protection of human rights. It intervenes only in case of a deficit on the part of the national authorities and in order to guarantee minimum standards. It is the national forum which is the primary arena for resolving Convention disputes, not Strasbourg.⁸⁷

The subsidiarity rule was formulated by the Court itself long ago.⁸⁸ It is now the subject of a specific provision of Protocol no. 15, albeit one which is, for the time being, not ratified by all the Member States, this being a condition for the Protocol to enter into force.

There is one main existing instrument, namely the margin of appreciation, which helps European judges to respect the subsidiary role of the Court (Sect. 2.2.2.1). One could also go beyond this existing tool and imagine a system which, by changing the majority rule when a judgment is given, would strengthen the subsidiarity mechanism (Sect. 2.2.2.2).

⁸³ See e.g. *Kemp v. Luxembourg*, n° 17140/05, 24 April 2008; *RTBF v. Belgium*, n° 50084/06, 29 March 2011; *Miessen v. Belgium*, n° 31517/12, 18 October 2016; *Kuznetsov and others v. Russia*, 13 March 2018, nos. 24970/08 and 56354/09.

⁸⁴ European Court of Human Rights (2018).

⁸⁵ See, among many others, Council of Europe (2015).

⁸⁶ ...all the more foolish as some member States have reduced or even stopped their financial contribution to the Council of Europe’s budget.

⁸⁷ Spano (2017).

⁸⁸ *Handyside v. United Kingdom* [plen.], application no. 5493/72, 7 December 1976, § 48.

2.2.2.1 Margin of Appreciation and Proportionality

The starting point for the margin of appreciation mechanism⁸⁹ lies in the fact that, while human rights are universal, national cultures are particular. The Court accepts that national authorities must benefit from a choice of the means to be utilised in their domestic legal systems for the performance of their obligations under the ECHR because they are “in principle, better placed than an international court to evaluate local needs and conditions”.⁹⁰ Furthermore, State parties have different written and unwritten constitutional systems and traditions, and are exposed to different challenges when implementing international obligations.⁹¹

The freedom of choice is not unlimited however. First, for the margin to operate there has to be the possibility of a choice; absolute rights (to life, not to be ill-treated, etc.) don’t allow a choice. Secondly, when qualified rights (freedom of religion, expression, etc.) are at stake, the Court imposes the respect of minimum standards and sets limits to the discretion of the national authorities. Interference must be necessary in a democratic society⁹² and the means used must be proportionate in order to achieve the purpose of the interference. In other words, they should not be excessive. Necessity implies the existence of a pressing social need. It is for the national authorities to assess such need. Besides the necessity test (should there be an interference with a right guaranteed by the Convention?) there can be the need for a balancing exercise which occurs when two equally protected qualified rights (e.g. freedom of speech vs. right to privacy) or an individual right and a public interest are in competition. Each of these steps is subject, however, to European supervision.

As it is for the national authorities to first assess the interference they deem necessary and for the Court to step in only if this margin is exceeded, the self-restraint the Court imposes on itself – it could indeed technically perfectly well step in to scrutinise every aspect of the State’s decision-making, but chooses to stand back and accept some of it as given – underlines its subsidiary role in the concrete implementation of respect of human rights. The breadth of the margin depends on various factors (e.g. societal choices,⁹³ local traditions,⁹⁴ whether sensitive moral or ethical issues are at stake⁹⁵) and has given rise to extensive case law.

⁸⁹ The notion is well known in French administrative law. If the judges were themselves called upon to take the decision, they might have taken a different one, but the administration made an assessment which remained within the limits of what the judges could accept.

⁹⁰ *Buckley v. United Kingdom*, application no. 20348/92, 25 September 1996, § 74; *Garib v. Netherlands* [GC], application no. 43494/09, 6 November 2017, § 137.

⁹¹ Villiger (2007).

⁹² *Handyside v. United Kingdom*, [plen.], application no. 5493/72, 7 December 1976.

⁹³ *S.A.S. v. France* [GC], application no. 43835/11, 1st July 2014, § 154 (Integral islamic veil in public space).

⁹⁴ *Lautsi v. Italy* [GC], application no. 30814/06, 18 March 2011, § 68 (Christian cross in classrooms).

⁹⁵ *A, B and C v. Ireland* [GC], application no. 25579/05, 16 December 2010, § 97 (abortion).

The narrower the margin, the more stringent the control. In principle, the Court's review is carried out on the basis of the reasons adduced by the national authorities to justify the impugned measure. It has to decide, on the basis of the different data available to it, whether the reasons provided by the national authorities in order to justify the actual interference complained of are relevant and sufficient for the purposes of the Convention.⁹⁶ If the national authorities have weighed the competing interests in compliance with the criteria laid down in the case-law, the Court requires strong reasons to substitute its view for that of the domestic courts.⁹⁷ Conversely, if there has been no proper assessment or balancing at the domestic level, the Court will itself carry out such an exercise.⁹⁸

Starting from the premise that national authorities deserve the largest possible trust by the European judge, some authors address the shift from a substantial to a procedural review of the margin of appreciation,⁹⁹ which is particularly appropriate where the margin of appreciation is deemed to be wide. The Court's control is then based on a presumption of compliance¹⁰⁰ and limited essentially to verifying a lack of arbitrariness where the procedural criteria are satisfied. As far as national rule-making is concerned, in a "qualitative, democracy-enhancing approach",¹⁰¹ the Court must examine whether the legislative decision-making process leading to measures of interference was fair and such as to afford due respect to the individual

⁹⁶ *Paradiso and Campanelli v. Italy* [GC], application no. 25358/12, 24 January 2017, § 179.

⁹⁷ See a recent definition of the margin of appreciation mechanism in an Article 8 case: "...the Court has generally understood the margin of appreciation to mean that, where the independent and impartial domestic courts have carefully examined the facts, applying the relevant human rights standards consistently with the Convention and its case-law, and adequately balanced the applicant's personal interests against the more general public interest in the case, it is not for it to substitute its own assessment of the merits (including, in particular, its own assessment of the factual details of proportionality) for that of the competent national authorities. The only exception to this is where there are shown to be strong reasons for doing so", *Ndidi v. United Kingdom*, application n° 41215, 14 September 2017, § 76.

⁹⁸ *Perinçek v. Switzerland* [GC], application no. 27510/08, 15 October 2015, §§ 199, 274 and 279.

⁹⁹ Nussberger (2017).

¹⁰⁰ The presumption mechanism entails dangers too. Cf. Arnardottir (2017), pp. 9–35 at 35: "[...] should the Court want to continue to develop presumptions of Convention compliance where it has previously performed its own proportionality assessments, it would be well advised to elaborate the relevant presumption, what is needed to rebut it, and whether or not it has been rebutted in an individual case – instead of oscillating between full deference and own assessments like it currently often seems to do in practice. It should also be kept in mind that the path it seems to be embarking upon in this respect lays it bare to new challenges in terms of the legitimacy of its judgments. Issues of quality and consistency can be raised (what triggers the new approach, what is needed for complete deference, what is needed for rebuttal, etc.); it seems clear that questions of double standards may be raised (why is the presumption applied/rebutted, in some judgments and not others); and it should also be pointed out that if the margin of appreciation can be criticized as a tool to evade the Court's judicial responsibility, the same criticism would seem to apply *a fortiori* to presumptions of Convention compliance. [...] Opening up the margin of appreciation, while still exercising the Court's authority to have the final say on the merits, could send the same signal without risking the problems identified above".

¹⁰¹ Spano (2014b), pp. 487–502.

interests safeguarded by the Convention.¹⁰² When dealing with individual measures, the Court must satisfy itself that the decision-making process was fair and allowed the concerned parties to present their case fully.¹⁰³ There is room for procedural control even as regards absolute rights, namely when procedural obligations, such as the obligation to examine the suspicious death of a person, are at stake.¹⁰⁴

The increasing emphasis laid on procedural review transpires from the Court's increasingly strict application of the obligation for an applicant to exhaust domestic remedies.¹⁰⁵ This is a prominent sign of the priority given to national courts to resolve disputes involving the exercise of the rights guaranteed by the Convention. A second manifestation of the jurisprudential application of the procedural review consists in the setting out by the Court of criteria to be applied by the national courts in order to verify whether a right under the Convention has been violated. There is now a whole series of judgments setting out such criteria, e.g. in the area of fair trial in criminal matters,¹⁰⁶ respect for privacy,¹⁰⁷ balancing the right to privacy and the right of free speech.¹⁰⁸ A recent judgment identifies no less than six criteria for national authorities to verify whether an employee has misused emails at his place of work.¹⁰⁹ At any rate, the national courts must still play the game and not deliberately refuse to follow the Court's case-law and apply the criteria set out in it.¹¹⁰

There is obviously a shared responsibility between the national authorities and the Court when it comes to respecting the margin of appreciation. The relationship is asymmetric, as it is for the Court to set the margin and for the national authorities to exercise their discretion within the boundaries established.¹¹¹ They cannot claim

¹⁰² E.g. in the field of the wearing of the integral veil in public space, *S.A.S. c. France* [GC], [GC], application no. 43835/11, 1st July 2014; *Dakir v. Belgium*, 11 July 2017, application no. 4619/12; *Belcacemi and Ouassar v. Belgium*, 11 July 2017, application no. 37798/13; of the obligations of the authorities in the field of euthanasia, *Lambert c. France* [GC], application no. 46043/14, 5 June 2015; in the field of the ban on political advertising on television and radio, *Animal Defenders v. UK* [GC], application no. 48876/08, 22 April 2013.

¹⁰³ *X. v. Latvia*, [GC], application no. 27853/09, 26 November 2013, § 102; *Garib v. The Netherlands*, [GC], application no. 43494/09, 6 November 2017, § 157.

¹⁰⁴ *Spano* (2014a).

¹⁰⁵ *V. Vuckovic v. Serbia* [GC] application nos. 17153/11 et al., §§ 69 et seq.

¹⁰⁶ *Ibrahim and others v. United Kingdom* [GC], application nos. 50541/08, 50571/08, 50573/08 and 40351/09, 13 September 2016.

¹⁰⁷ *Roman Zakharov v. Russia* [GC], application no. 47143/06, 4 December 2015 (secret surveillance).

¹⁰⁸ *Von Hannover v. Germany* (n° 2) [GC], application nos. 40660/08 and 60641/08, 7 February 2012.

¹⁰⁹ *Barbulescu v. Romania* [GC], application no. 61496/08, 5 September 2017.

¹¹⁰ See *Barbulescu v. Romania* [GC], application no. 61496/08, 5 September 2017, §§ 131 et seq. where the domestic courts stated the different criteria but failed to apply them to the facts of the case.

¹¹¹ This should not be misunderstood. It is not the Court's task to set in advance and in an abstract way the boundaries of the margin of appreciation. It can only do so *ex post*, in a given case, and examine whether a national court has respected its margin of appreciation or not. This then becomes case law which gives the national courts guidance in subsequent cases.

the margin of appreciation for themselves before the Court has set minimum standards. A dialogue between national courts and the European Court may be engaged as national contexts may develop and change in the course of time. The Court can also discover the existence of a relevant consensus among European States, a factor that will narrow the different States' margin of appreciation in the concerned area.

The margin of appreciation mechanism and the proportionality test are closely interrelated. Once the scope of the margin of appreciation is set in relation to a given Convention complaint, the European judges will perform a more fact-specific inquiry where they determine whether the measures actually taken were necessary in order to achieve the – accepted – purpose of the restriction to the right at stake. The restriction needs to be “proportionate”, which means that it should not be excessive.¹¹² Here again, the Court admits variations but sets limits.

Although the margin of appreciation mechanism and the proportionality test are criticised for their ambiguities¹¹³ and the Court for lacking consistency¹¹⁴ when applying them, they remain the core pieces in the subsidiarity framework aimed at preserving the European judge's legitimacy.

¹¹²Despite the term “proportionate” which in principle raises the question of proportionate to what, the proportionality test does not imply a comparative exercise.

¹¹³Some consider that, where it is a question of balancing two rights in conflict, the margin of appreciation has no place: “One might have expected the Court to argue the precise opposite: a situation where the basic rights of individuals are in conflict is precisely the sort of case in which the Court itself, as the guardian of those rights, needs to investigate closely and make its own decision on every aspect of the matter. Where those decisions are easy to make, it might have said, assessment of the relevant factors may more safely be left to the state, but in these difficult cases judicial self-restraint is not appropriate”, Malcolm (2017), p. 47 *in fine*.

¹¹⁴About the margin of appreciation: “In one and the same case, we find the following views: that the margin was wide because of factual complexity and the difficulty of examining all the circumstances in commercial matters; that the state remained within the margin because its arguments about points of principle were correct; that the Court had a duty to examine all the circumstances in commercial matters, which meant that there was no margin; that the margin must be smaller in commercial matters because the dispute there is between private interests, not involving calculation of the general interest by the state; and that, on a point of principle, there should be no margin at all in such a case”, Malcolm (2017), p. 49. About the proportionality test: “We are in the realms of ‘balancing’, trying to establish just how much of this right should be taken as the equivalent of that countervailing right or interest, so that a little extra weight on the countervailing side will justify a little interference, and a larger amount will justify interference to a greater extent. As the standard modern work on proportionality points out, there are various choices and decisions to be made here, into each of which an element of subjectivity can enter: choosing which interests should be taken as the relevant ones on both sides, deciding whether this interest is intrinsically more important than that one, assessing whether each of the relevant interests is strongly or weakly engaged in this particular situation, and then performing the final comparative measurement, when there is no real common scale on which to place the two (or more) things”, Malcolm (2017), p. 28.

2.2.2.2 Changing the Majority Rule for Giving a Judgment?

Despite all the efforts of the Court and the Member States to invigorate the principle of subsidiarity, a principle which implies self-restraint by the European judge in case a solution is not straightforward, the simple majority rule governing the decisions of the Court – which is contained in Rule 23 of the Rules of the Court and not in the Convention itself – risks undermining the entire patiently constructed theoretical edifice.

The confidence in national bodies implied by the principle of subsidiarity (the margin of appreciation and proportionality, which are essentially vague concepts and allow various equally acceptable positions on the same issue) implies that in doubtful cases the Court will trust national courts. How then can a Grand Chamber judgment obtained by a very narrow majority, in the worst case scenario by 9 votes to 8, be reconciled with the subsidiary role of the Court? An extreme case can be imagined: a national Supreme court where dissenting votes are possible and known adopts a certain solution unanimously. A Chamber of the Court concludes unanimously that there has been no violation of the Convention. Following referral, the Grand Chamber then finds a violation of the same Convention article by 9 votes to 8. It is only necessary to count the votes of the judges of the Court at both Chamber and Grand Chamber level to find out that a minority has in fact found in favour of a violation.¹¹⁵ In a national system, there are – albeit doubtful¹¹⁶ – reasons for the superior qualification of appellate judges over first instance judges, but this is not the case for Strasbourg judges where it is chance that determines whether a judge sits in a Chamber or in a Grand Chamber in the same case. This scenario demonstrates how the subsidiary role of the Court can be defeated in a situation where a minority of judges at the Court disagree with the national court and where there is room for different assessments, the opinion of that minority can prevail.

The result is unfortunate, and it is perhaps these judgments that are the most damaging to the legitimacy of the Court.

Could shaping subsidiarity, in the sense of requiring a qualified, clear majority for finding a violation of the Convention, be imagined? Not without some difficulties. Admitting that a proposed violation of the Convention would find a simple, albeit not the necessary majority, what would the judgment look like? Could there be any judgment at all? There would probably be two “opinions”, one by the simple yet insufficient majority and one by the minority. The Court would declare that no violation has been found but that no reasoned judgment could be delivered as the question remained controversial. If such a result were obtained in the Grand Chamber after the non-violation judgment by a Chamber, the judgment of the Chamber would be *res judicata*. On the contrary, if the Chamber judgment had found a violation, the overall effect of the Grand Chamber’s deliberation would be that there is no violation, however without any reasoned judgment. Still, there would

¹¹⁵ Some judges openly make such calculations, see common separate opinion by Judges Yudkivska, Vehabović and Kūris in *Radomilja and others v. Croatia* [GC], 20 March 2018, application nos. 37685/10 and 22768/12.

¹¹⁶ Ravarani (2010), p. 355 et seq.

be a solution to the case and probably interesting opinions by the relative majority and the minority that could be discussed in academia and be useful for further cases.

If such a system appears unsatisfactory, it has to be noted that it has antecedents, i.e. the system prevailing in the earlier days of the Convention system when, in the Committee of Ministers, there had to be a qualified majority for finding a violation of the Convention. Despite all its negative points, such system would avoid declarations of violations if there is no overall majority of judges (Chamber plus Grand Chamber) in favour of such solution. This would then exclude the finding of “narrow” violations and thus strengthen the Court’s legitimacy.

3 Conclusion

At the end of this little excursion into the difficulties which European judges must address if they are to “merit” their legitimacy, it seems as if they are, after all, in “good company”. Any judge, even a national judge, has to face the reproach of a democratic deficit. Such a challenge flows from a very narrow understanding of what democracy is really about and from the assumption that there is no legitimacy other than that of an elected parliament.

A judgment cannot please everybody and in fact it will almost inevitably displease one of the parties. It can also displease State authorities, the political power, parliament. This alone doesn’t mean that the legitimacy of the judge who delivers the judgment can be challenged unconditionally. If the judgment is in accordance with the law and sufficiently reasoned and if, moreover, there is no problem about the judges’ impartiality, no legitimacy issue should reasonably arise. Such legitimacy has a different shape and nature than that of the political power. However, far from being in competition, the two forms of legitimacy are complementary.

If the political power wishes to change the legal provisions with reference to which a judgment has been given or if it is not satisfied with their interpretation, it can change the law. In no way should the political power interfere directly, be it in a pending case or after a judgment has been given, in the judges’ work, by giving instructions to the judiciary.

It is true that where the judgment emanates from an international judge interpreting an international treaty, the national political power cannot unilaterally change the norm but either has to initiate the – risky and unlikely to be successful – change of the relevant international instrument under which the impugned judgment was given or must seek in a subsequent case to have the relevant case-law reversed. The situation is not genuinely different from the wish, by a national legislator, to change a provision of the constitution that is interpreted by the constitutional court in a way that displeases; things are even more difficult when fundamental rights enshrined in the constitution are concerned. This does not call into question, however, the legitimacy of the competent judge as he or she has been charged to apply and to interpret the rules laid down in the constitution; it is the normal functioning of a separation of powers political regime characterised by checks and balances.

A legitimacy problem only arises if national or international judges overstep their jurisdiction or give totally unreasonable judgments. The ultimate guarantors of legitimacy are the judge's professionalism and reasonableness.

Of course, like any institutional power, the judiciary has to face criticism. However, here too, one has to distinguish between reasonable and unreasonable criticism. If criticism is about a certain decision and if it is based on a solid argumentation, the judge has to take it into account, to reflect on it and possibly react to it in subsequent judgments. If it is diffuse, general, or aimed at the very office of the judge, one has to be extremely careful. A large proportion of the population only see the Strasbourg Court as a court "for crooks and criminals". They hardly imagine that one day they themselves might have to seek the protection of their fundamental rights in Strasbourg or via Strasbourg case-law domestically applied. This contrasts with the fact that tens of thousands of European citizens and residents, year in and year out, file applications complaining to the Court about alleged (and frequently, serious) violations of their fundamental rights. As soon as a judgment of the Court finds a violation of the Convention by a State, indignation is general and unanimous – except in the legal journals read by specialists. In contrast, the many judgments finding no violation in often very sensitive areas are generally ignored.¹¹⁷

Moreover, as far as an international court and, in particular, the ECtHR, is concerned, it is difficult to turn a blind eye to the vigorous progress of nationalism, enhanced by populism, which puts internationalism on the defensive.¹¹⁸ The national State is considered to be the only legitimate framework for making decisions and protecting people's interests.

The most virulent criticisms of the legitimacy of the European judge demonstrate one thing: he or she is certainly not the only international player to endure such criticism and seems to be rather a collateral victim of the return of nationalism.¹¹⁹

¹¹⁷ E.g. for the United Kingdom, Amos (2017), p. 773: "In 2015, 575 applications against the UK were allocated to a judicial formation and 720 were allocated in 2014. In 2015, 13 judgments were delivered concerning the UK, with four judgments finding at least one violation and nine judgments finding no violation. Also in 2015, 136 interim measures sought under Rule 39 against the UK were refused". There are very important issues where the Court did not find a violation, e.g. in the judgment about "kettling" techniques to contain demonstrations, *Austin v. U.K.*, [GC], 15 March 2012, application nos. 39692/09, 40713/09 and 41008/09.

¹¹⁸ Ory (2017). The author identifies three elements that characterise populism: a fundamental postulate of a confiscated popular sovereignty, a strong identification with a national community and a clear personalisation of leadership, the ideal model of populism locating in such personalisation the place where its contradictions can be solved (p. 46). The national State appears to be the ideal vehicle for federating such feelings, the ideal victim being of course an international organisation, especially if it exercises some authority over the national State's institutions. It is apparently essential for any human being to have somebody on whom to concentrate his hatred (see Einstein and Freud (1996)).

¹¹⁹ The criticisms stem from the premise that the national legislator and, consequently, the framework of the national State, is the supreme body for the expression of the will of the people, sweeping away other less contingent and sometimes artificial frameworks to obtain, and to take into account, the will of the people. Cf. Bellamy (2014), p. 1030 s.; Donald and Leach (2016), p. 131.

If, as has been stated above, the ultimate guarantee of legitimacy is the judge's reasonableness, it is of course impossible to define what a reasonable judge is. The European judges should certainly not overstretch the dynamic interpretation of the Convention and should thoroughly respect the subsidiary role of the Court. On the other hand, if for fear of alienating certain virulent critics, especially from countries seriously considering turning their backs on internationalism and the international protection of human rights, the European judges begin to have more regard for these susceptibilities than for the effective protection of human rights, they will definitely have forfeited any claim to legitimacy.

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On Judicial Independence and the Quest for National, Supranational and Transnational Justice



Koen Lenaerts

1 Introduction

For centuries, judges, lawyers and legal scholars have read the law, examined the case law and studied the text books with the same objective in mind, that of finding justice. It is this quest for justice – our “Holy Grail” as one might call it – that defines the legal profession in its mission to pass on a fairer and more equal society for the next generation.

As defined by the constitutional traditions common to the Member States of the European Union, democracies are built on the understanding that, regardless of their political affiliation, religious beliefs and cultural heritage, individuals enjoy a sphere of self-determination that must, at all times, be free from public or, as the case may be, private interference.

This means, in practice, that the incumbent political majority is prevented, by constitutional law, from oppressing individuals that belong to discrete minorities that lack the means to defend themselves within the political process. That is also why the constitutions of the Member States entrust courts – as independent umpires – with the task of protecting that individual sphere of self-determination. In Europe, the idea of justice is therefore deeply intertwined with that of upholding individual rights.

This shows the link between individual rights, democracy and justice that is embedded in those constitutional traditions: democracies are only as strong as the protection that they provide to individual rights. The more effective that protection is, the stronger democracy will be. At the same time, the effectiveness of that protection depends on the independence of judges. Indeed, the more robust judges are in

President of the Court of Justice of the European Union, Professor of European Union Law at the University of Leuven (Belgium).

K. Lenaerts (✉)

Court of Justice of the European Union, Luxembourg City, Luxembourg

carrying out their duties without fear nor favour, the more effective the protection of individual rights is, and the stronger democracy will be.

The independence of the national judiciary not only contributes to reinforcing national democracies individually, but also when acting collectively within the framework of the EU in order to achieve common objectives.

In both the Member States and the EU, respect for the rule of law means no more and no less than respect for judicial decisions, especially in cases where a court does not rule in favour of the incumbent political majority of the moment. For example, it was the need to ensure the effectiveness of final judicial decisions and thus, the need to uphold the rule of law within the EU, that led the European Court of Justice (“ECJ”) to hold in *Commission v Poland* that the adoption of interim measures may be accompanied by the imposition of a periodic penalty payment in the event that those measures would not be complied with.¹ Such imposition is not to be seen as a sanction, but as a means of ensuring the effective application of EU law in cases where there are grounds for doubting that the Member State concerned has complied with a previous interim relief order or that it is prepared to comply with a new order.²

As Chief Justice Marshall famously wrote in the legendary *Marbury v Madison* case more than two centuries ago, “[it] is emphatically the province and duty of the judicial department to say what the law is.”³ If we, the peoples of Europe, want governments of laws and not men, we must, first and foremost, honour what judges say about the law. This is, in my view, how real European democracies work and must continue to work in the future. That is the reason why judicial independence is of pivotal importance, since it ensures that judges remain faithful to the law and only to the law. Judicial independence is the bedrock of our democracies, be it at national or European level. One may go as far as to say that judicial independence is part of both our common heritage and of our very identity as Europeans.

The same applies to the European Economic Area (“EEA”) where the rule of law is centre stage in that system of decentralised integration.⁴ The purpose of this essay is to pay tribute to Carl Baudenbacher, President of the EFTA Court from 2003 to 2017, whose legacy to the legal community, both as judge and as a legal scholar, is of immense value. My contribution is structured as follows. Section 2 looks at judicial independence from a supranational perspective. In light of the relevant case law of the ECJ, it is submitted that judicial independence is of paramount importance for the law of the EU, given that access to the preliminary reference procedure – a procedure that ensures the uniform application of that law – is only open to independent courts. That is the reason why in the recent judgment of the ECJ in *Associação Sindical dos Juizes Portugueses*, that court held that EU law protects the independence of national courts, since it is an essential prerequisite for the judicial dialogue

¹ ECJ order of 20 November 2017 in case C-441/17 R, *Commission v Poland*, EU:C:2017:877.

² *Ibid.*, paras 102, 103, and 109.

³ US Supreme Court, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

⁴ See generally EFTA Court (eds) (2015) *The EEA and the EFTA Court: Decentralised Integration*.

between the ECJ and the national courts.⁵ Section 3 is devoted to another recent judgment of the ECJ in *Achmea*, which reflects the objective of protecting the integrity of that dialogue. This case concerned an arbitration clause contained in a Bilateral Investment Treaty (“BIT”).⁶ In Sect. 4, it is argued that the objective of creating an Area of Freedom, Security and Justice (“AFSJ”) is to be achieved by relying on judicial cooperation in civil and criminal matters. Such cooperation requires independent national courts that trust each other as being equally committed to upholding the rule of law.⁷ Thus, from a transnational perspective, the principles of mutual trust and judicial independence go hand in hand. Finally, a brief conclusion supports the contention that the ECJ is committed to protecting the independence of national courts as such protection is vital to upholding the rule of law within the EU.

2 Judicial Independence and the Effective Protection of EU Rights

2.1 *Judicial Independence and the Notion of ‘Court or Tribunal’ Within the Meaning of Article 267 TFEU*

From a supranational perspective, national courts play a vital role in securing effective protection of the rights that EU law confers on individuals. Those courts are, in cooperation with the ECJ, to enforce the law of the EU so as to provide effective remedies against defaulting Member States and against EU institutions that have acted in breach of the Treaties and/or the Charter of Fundamental Rights of the European Union (“Charter”).⁸

To that end, the ECJ has held that, by virtue of EU law, national courts are, for example, empowered to set aside a provision of national law that is incompatible with EU law, even if that provision enjoys constitutional status under the laws of the Member State concerned.⁹ National courts may also grant interim relief so as to ensure that EU rights are preserved before it is too late.¹⁰ In the same way, a person

⁵ ECJ judgment of 27 February 2018 in case C-64/16, *Associação Sindical dos Juízes Portugueses*, EU:C:2018:117.

⁶ ECJ judgment of 6 March 2018 in case C-284/16, *Achmea*, EU:C:2018:158.

⁷ See generally Lenaerts (2017), pp. 805–840.

⁸ See generally De Witte et al. (2016).

⁹ See, e.g., ECJ judgments of 9 March 1978 in case 106/77, *Simmmenthal*, EU:C:1978:49, and of 8 September 2010 in case C-409/06, *Winner Wetten*, EU:C:2010:503.

¹⁰ Regarding interim relief against national measures, see, e.g., ECJ judgment of 19 June 1990 in case C-213/89, *Factortame and Others*, EU:C:1990:257. As to EU measures, see ECJ judgment of 21 February 1991 in joined cases C-143/88 and C-92/89, *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest*, EU:C:1991:65.

may also claim compensation before a national court for the harm that a defaulting Member State or an individual has caused to his or her EU rights.¹¹

Given that each and every EU citizen is entitled to the same rights, it is of paramount importance that national courts apply EU law in a uniform fashion. With a view to ensuring that uniformity, and when experiencing doubts as to the interpretation of a provision of EU law, national courts are to engage in a dialogue with the ECJ by having recourse to the preliminary reference procedure. To put it in the ECJ's own words, "the [EU] judicial system [...] has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU, which, by setting up a dialogue between one court and another, specifically between the [ECJ] and the courts and tribunals of the Member States, has the object of securing uniform interpretation of EU law".¹²

That same imperative of uniformity applies where a national court has serious doubts as to the legality of an act adopted by the institutions, bodies, offices or agencies of the Union. That is why national courts are precluded from exercising jurisdiction in respect of the legality of such an act. Instead, they are required to make a reference to the ECJ which has the power to review the legality of EU acts. In that regard, that Court has held that "requests for preliminary rulings which seek to ascertain the validity of a measure constitute, like actions for annulment, a means for reviewing the legality of European Union acts".¹³

It follows that national courts or tribunals, within the meaning of Article 267 TFEU, are, first and foremost, called upon to protect effectively the rights that EU law confers on individuals, thereby providing them with "supranational justice" and upholding the rule of law within the EU. In order to have access to the preliminary reference procedure national courts must be independent because only those courts can be trusted with applying loyally the law of the EU, as interpreted by the ECJ. The effective protection of EU rights indeed requires that the competent national court is insulated from any political pressure, notably on the part of the public authorities that brought about the breach of these rights.

The fact that the preliminary reference procedure is open only to independent courts stems from the fact that Article 267 TFEU refers explicitly to "any court or tribunal of a Member State".¹⁴ As understood by the ECJ, the notion of "court or tribunal" is an autonomous concept of EU law.¹⁵ This means that national law is not decisive in order to determine whether the body making a preliminary reference

¹¹ See, e.g., ECJ judgments of 19 November 1991 in joined cases C-6/90 and C-9/90, *Francovich and Others*, EU:C:1991:428; of 5 March 1996, in joined cases C-46/93 and C-48/93, *Brasserie du Pêcheur and Factortame*, EU:C:1996:79; of 20 September 2001 in case C-453/99, *Courage and Crehan*, EU:C:2001:465; of 30 September 2003 in case C-224/01, *Köbler*, EU:C:2003:513.

¹² ECJ Opinion 2/13 (Accession of the European Union to the ECHR) of 18 December 2014, EU:C:2014:2454, para. 176.

¹³ ECJ judgment of 28 March 2017 in case C-72/15, *Rosneft*, EU:C:2017:236, para. 68.

¹⁴ See, generally, Broberg and Fenger (2014).

¹⁵ See, e.g., ECJ judgment of 24 May 2016 in case C-396/14, *MT Højgaard and Züblin*, EU:C:2016:347, para. 23.

qualifies as a “court or tribunal” under that Treaty provision. It is, however, relevant in verifying whether the factors to which EU law subjects the notion of “court or tribunal” are present.

It follows from settled case law that the ECJ “will take account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent”.¹⁶

The concept of judicial independence requires, in the administrative law context, that judicial power should be exercised by a body that acts as a third party in relation to the authority which adopted the contested decision. Thus, for example, in *Devillers*, the ECJ ruled that the Belgian Regional Council of the Society of Veterinary Doctors was not a third-party for the purposes of making a preliminary reference, since it was the body responsible for imposing disciplinary sanctions against the applicant in the main proceedings, i.e. a veterinarian who had allegedly violated the relevant rules of professional conduct.¹⁷

In addition, the concept of judicial independence, as developed in the seminal *Wilson* judgment,¹⁸ has both an internal and an external dimension. Internally, judicial independence is intended to ensure a level playing field for the parties to proceedings and for their competing interests. In other words, independence requires courts to be impartial.

Externally, judicial independence establishes the dividing line between the political process and the courts. Courts must be shielded from any external influence or pressure that might jeopardise the independent judgement of their members as regards proceedings before them.¹⁹ That protection must apply to the members of the judiciary, by, for example, laying down guarantees against removal from office.²⁰ Thus, in *Syfait*, the ECJ held that in the absence of adequate safeguards in respect of the dismissal or termination of the appointment of “judges” belonging to the Greek competition authority, the rules governing their tenure did not appear to provide effective protection against undue intervention or pressure from the executive.²¹ Accordingly, that authority could not be seen as a “court or tribunal” within the meaning of Article 267 TFEU.

¹⁶ See, for example, ECJ judgments of 30 June 1966 in case 61/65, *Vaassen-Göbbels*, EU:C:1966:39; of 10 December 2009 in case C-205/08, *Umweltanwalt von Kärnten*, EU:C:2009:767, para. 35; of 6 October 2015 in case C-203/14, *Consorti Sanitari del Maresme*, EU:C:2015:664, para. 17, and *MT Højgaard and Züblin*, cited above, para. 23.

¹⁷ The ECJ noted that, whilst the member of that Council in charge of investigating the case did not participate in the deliberations, nor took part in the adoption of the final decision, there was a close functional link between him and that Council. See ECJ order of 28 November 2013 in case C-167/13, *Devillers*, not published, EU:C:2013:804, para. 19.

¹⁸ ECJ judgment of 19 September 2006 in case C-506/04, *Wilson*, EU:C:2006:587, paras 49–52.

¹⁹ *Ibid.*, para. 51.

²⁰ See ECJ judgments of 22 October 1998, in joined cases C-9/97 and C-118/97, *Jokela and Pitkäranta*, EU:C:1998:497, para. 20, and judgment of 4 February 1999 in case C-103/97, *Köllensperger and Atzwanger*, EU:C:1999:52, para. 21.

²¹ ECJ judgment of 31 May 2005 in case C-53/03, *Syfait and Others*, EU:C:2005:333, para. 31.

Furthermore, the external aspect of judicial independence also requires the absence of any “hierarchical constraint or subordination to any other body that could give [...] orders or instructions” to the body making the reference. Therefore, in *Margarit Panicello*, the ECJ ruled that the Registrar (“*Secretario Judicial*”) of a Spanish court did not constitute a “court or tribunal” within the meaning of Article 267 TFEU, since he or she was required to comply with instructions from a hierarchical superior when making a reference in the context of an action for the recovery of fees due for legal services.²²

Similarly, the EFTA Court has ruled that only independent bodies may make a request for an Advisory Opinion under Article 34 SCA.²³ In so doing, that Court has drawn inspiration from the case law of the ECJ when defining the notion of “court or tribunal” set out in that provision of the SCA.²⁴ For example, in *Inconsult Anstalt*, the EFTA Court found that the Appeals Commission of the Financial Market Authority of Liechtenstein qualified as a “court or tribunal” for the purposes of Article 34 SCA. It noted that that Appeals Commission “[gave] rulings, without receiving any instructions and in total impartiality, on decisions adopted by the Financial Market Authority. In this respect the Appeals Commission has a status separate from the authority which adopted the decision under appeal”.²⁵

Once it has been established that the body making a reference qualifies as a “court or tribunal” within the meaning of Article 267 TFEU and, where appropriate, that of Article 34 SCA, that body may engage in a dialogue with the ECJ and, regarding Norwegian, Icelandic and Liechtenstein courts, with the EFTA Court. As mentioned above, that dialogue is of paramount importance since it ensures the uniform application of EU law.

2.2 *Article 19 TEU and the Protection of Judicial Independence*

Logically, the question that arises is whether, once it has been established that a body qualifies as a “court or tribunal” within the meaning of Article 267 TFEU, EU law may also protect that body against a national measure that threatens its

²² ECJ judgment of 16 February 2017 in case C-503/15, *Margarit Panicello*, EU:C:2017:126, paras 41 and 42.

²³ See EFTA Court judgment of 16 December 1994 in case E-1/94, *Restamark*, [1994–95] EFTA Ct. Rep. 15, paras 24 et seq. See also EFTA Court judgment of 16 June 1995 in joined cases E-8/94 and E-9/94, *Mattel and Lego* [1994–95] EFTA Ct. Rep. 113.

²⁴ See *Restamark*, cited above, para. 24 (referring to ECJ judgment of 27 April 1994 in case C-393/92, *Almelo*, EU:C:1994:171, para. 21), and of 27 January 2010 in case E-4/09, *Inconsult Anstalt*, [2009–2010] EFTA Ct. Rep p. 88, para. 23 (referring to ECJ judgments of 17 September 1997 in case C-54/96, *Dorsch Consult*, EU:C:1997:413, para. 23 and of 14 June 2001 in case C-178/99, *Salzman*, EU:C:2001:331, para. 13).

²⁵ *Inconsult Anstalt*, cited above, para. 23.

independence. Here, the focus is not on protecting judges as beneficiaries of fundamental rights, but on protecting judges as the arm of the law, i.e. of EU law.

2.2.1 National Judges as Individuals

Just like any other EU citizen or third-country national, national judges are protected by EU law in their individual capacity. Where a national measure that implements EU law adversely affects their fundamental rights, national judges may bring proceedings before the competent court, basing their application on the relevant provisions of the Charter. They may also base their application on EU legislation giving concrete expression to a fundamental right recognised in the Charter, such as the Discrimination Directives.²⁶ The rulings of the ECJ in *Florescu* and *Commission v Hungary* illustrate this point.

In *Florescu*,²⁷ five retired Romanian judges who also taught at university challenged a law that prohibited combining their pension with revenue from paid employment, where that pension was higher than the gross average national income. That law was the result of austerity measures that Romania had adopted in exchange for financial assistance granted by the EU. After finding that the law in question implemented EU law within the meaning of Article 51(1) of the Charter, the ECJ held that those judges could rely on their right to property, as enshrined in Article 17 of the Charter, in order to challenge the compatibility with EU law of the Romanian law.²⁸ However, the ECJ found that, whilst that law imposed a limitation on the exercise of the applicant's right to property, it sought to pursue a legitimate objective, i.e. the need to reduce public spending in the exceptional circumstances of the global financial and economic crisis.²⁹ Moreover, in the light of such exceptional circumstances, that limitation complied with the principle of proportionality.³⁰

Similarly, in *Commission v Hungary*,³¹ the ECJ held that Hungary had failed to fulfil its obligations under Directive 2000/78 by adopting rules imposing compulsory retirement on judges, prosecutors and notaries on reaching the age of 62. The ECJ found that those rules pursued two legitimate objectives, i.e. the standardisation, in the context of professions in the public sector, of the age-limit for compulsory retirement and the establishment of a "more balanced age structure" facilitating access for young lawyers to the professions of judge, prosecutor and notary. However, in so doing, those rules failed to comply with the principle of proportionality.³² In particular, the ECJ noted that the rules in question "abruptly and

²⁶ See e.g. Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L 303/16.

²⁷ ECJ judgment of 13 June 2017 in case C-258/14, *Florescu and Others*, EU:C:2017:448.

²⁸ *Ibid.*, paras 48 and 49.

²⁹ *Ibid.*, para. 56.

³⁰ *Ibid.*, paras 57 and 58.

³¹ ECJ judgment of 6 November 2012 in case C-286/12, *Commission v Hungary*, EU:C:2012:687.

³² *Ibid.*, para. 80.

significantly lowered the age-limit for compulsory retirement [i.e. from the age of 70 to that of 62], without introducing transitional measures of such a kind as to protect the legitimate expectations of the persons concerned” and of such a kind as to enable them to make the necessary economic and financial arrangements.³³

2.2.2 National Judges as the Arm of EU Law

Most importantly, as regards the protection of national judges in their role as the arm of EU law (or, put more simply, as “European judges”), the ECJ held in *Associação Sindical dos Juízes Portugueses* that the second subparagraph of Article 19(1) TEU may be relied upon in order to set aside national measures that call into question the independence of the national judiciary.³⁴ The facts of that case are as follows.

In response to the EU programme of financial assistance and with a view to curbing its excessive budget deficit, Portugal passed a law in 2014 that sought to cut public spending by reducing the salaries of various public office holders and employees, including members of the legislature, the executive and the judiciary. Such salary-reduction measures also applied to the members of the Portuguese Court of Auditors (“Tribunal de Contas”). The Union of Portuguese Judges, acting on behalf of those members, brought legal proceedings against the administrative acts implementing that law, arguing that those salary-reduction measures threatened the judicial independence of the said members, as guaranteed by Article 19 TEU and Article 47 of the Charter.

At the outset, the ECJ stressed the fact that the second subparagraph of Article 19(1) TEU applies *ratione materiae* to “the fields covered by EU law”, irrespective of whether the Member States are implementing EU law within the meaning of Article 51(1) of the Charter.³⁵ Next, the ECJ went on to explain the relationship between the rule of law, Article 19 TEU, the principle of effective judicial protection and national courts. It held that the EU is founded on the values set out in Article 2 TEU, such as respect for the rule of law. Article 19 TEU gives concrete expression to that founding value by entrusting “the responsibility for ensuring judicial review in the EU legal order not only to the [ECJ] but also to national courts and tribunals”.³⁶ Accordingly, the Member States are under the obligation “to establish a system of legal remedies and procedures ensuring effective judicial protection in [the fields covered by EU law]”.³⁷ In that regard, the ECJ found that there is an unbreakable link between compliance with the rule of law and the principle of effective judicial protection: one cannot exist without the other. The bodies entrusted with responsibility for upholding the rule of law within the EU – i.e.

³³ Ibid., paras 68, 69 and 70.

³⁴ *Associação Sindical dos Juízes Portugueses*, cited above.

³⁵ Ibid., para. 29.

³⁶ Ibid., para. 32.

³⁷ Ibid., para. 34.

“courts or tribunals” – must meet the requirements of effective judicial protection. This means, in essence, that such protection must be provided for by a body that falls within the notion of “court or tribunal” as defined by EU law. In particular, referring to its case law on Article 267 TFEU and on Article 47 of the Charter, the ECJ held that that notion requires courts to be independent.³⁸ After recalling what judicial independence means for the purposes of that case law, the ECJ found that “the receipt by those members of a level of remuneration commensurate with the importance of the functions they carry out constitutes a guarantee essential to judicial independence”.³⁹

As to the case at hand, the ECJ found, subject to final verification by the referring court, that the Tribunal de Contas could fall within the notion of “court or tribunal” as defined by EU law.⁴⁰ Regarding the compatibility with the second subparagraph of Article 19(1) TEU of the salary-reduction measures at issue, the ECJ held, first, that those measures were adopted as a response to mandatory requirements linked to eliminating the Portuguese State’s excessive budget deficit and in the context of an EU programme of financial assistance to Portugal.⁴¹ Second, the reduction of the amount of remuneration was limited to a percentage varying in accordance with the level of salary.⁴² Third, they were temporary in nature since by 2016, the full reinstatement of the rights to remuneration at issue in the main proceedings had already taken place.⁴³ Most importantly, the salary-reduction measures did not target the members of the Tribunal de Contas specifically, but applied to various public office holders as part of a comprehensive effort to cut down spending in the public sector at a time of economic crisis.⁴⁴ As a result, the ECJ ruled that those measures could not be considered to impair the independence of the members of the *Tribunal de Contas*.

In my view, three direct implications flow from the judgment of the ECJ in *Associação Sindical dos Juízes Portugueses*. First, it shows that the scope of application of the second subparagraph Article 19(1) TEU is not the same as that of Article 47 of the Charter. The former applies to “the fields covered by EU law”, whilst the latter applies to national measures implementing EU law within the meaning of Article 51(1) of the Charter. Second, where a national court qualifies as a “court or tribunal” as defined by EU law and such a court enjoys jurisdiction to rule

³⁸ Ibid., paras 42, 43 and 44. Regarding Article 47 of the Charter – which contains the notion of “independent and impartial tribunal” – the ECJ referred to ECJ judgments of 14 June 2017 in case C-685/15, *Online Games and Others*, EU:C:2017:452, para. 60; and of 13 December 2017 in case C-403/16, *El Hassani*, EU:C:2017:960, para. 40. As to the notion of “court or tribunal” set out in Article 267 TFEU, it referred to *Wilson*, cited above, para. 49, and *Margarit Panicello*, cited above, para. 37.

³⁹ *Associação Sindical dos Juízes Portugueses*, cited above, para. 45.

⁴⁰ Ibid., para. 40.

⁴¹ Ibid., para. 46.

⁴² Ibid., para. 47.

⁴³ Ibid., para. 50.

⁴⁴ Ibid., para. 49.

on questions of EU law, that court acts as a “European court” and accordingly, EU law protects its independence. Last but not least, that judgment is a positive development in the law on judicial remedies. It shows that national courts are called upon to play a pivotal role in European integration, and that the ECJ is committed to upholding the rule of law within the EU.

3 The Integrity of the Judicial Dialogue Between the ECJ and National Courts

In order for the judicial dialogue between the ECJ and national courts to be effective, no field of EU law may be removed from the scope *ratione materiae* of the preliminary reference procedure. Where national courts apply the relevant provisions of EU law, they must have the possibility and, where appropriate, the obligation to engage in a dialogue with the ECJ. Otherwise, if either the EU political institutions or the Member States were able to remove a given field of EU law from the jurisdiction of national courts – and thereby from the scope of the preliminary reference procedure – the entire EU system of judicial protection, which is a defining feature of the EU and one of the principal guarantees of its autonomy, would be called into question.

As that system ensures the equal and uniform protection of rights across the EU, its integrity must be protected. This means, for example, that neither the EU political institutions nor the Member States may enter into an international agreement the effects of which would be to prevent the ECJ and national courts from engaging in dialogue in a given field of EU law.

For example, in Opinion 1/09,⁴⁵ the ECJ held that the draft agreement creating a Unified Patent Litigation System was not compatible with EU law, given that it conferred on an international court – which was outside the institutional and judicial framework of the EU – exclusive jurisdiction to hear a significant number of actions brought by individuals in the field of the Community patent and to interpret and apply European Union law in that field. That exclusive jurisdiction meant that all national courts would be deprived of their powers in relation to the interpretation and application of the relevant provisions of EU law and the ECJ of its powers to reply, by preliminary ruling, to questions referred by those courts.

Accordingly, the ECJ ruled that the EU could not ratify the agreement as drafted, since that agreement would alter the essential character of the powers which the Treaties confer on the institutions of the EU and on the Member States. More generally, it stressed the fact that all international agreements to which the EU becomes a party must ensure compliance with “the system set up by Article 267 TFEU [which] establishes between the [ECJ] and the national courts direct cooperation as part of which the latter are closely involved in the correct application and uniform

⁴⁵ ECJ Opinion 1/09 (Agreement creating a Unified Patent Litigation System) of 8 March 2011, EU:C:2011:123.

interpretation of [EU] law and also in the protection of individual rights conferred by that legal order".⁴⁶ Indeed, "the tasks attributed to the national courts and to the [ECJ] respectively are indispensable to the preservation of the very nature of the law established by the Treaties".⁴⁷

More recently, in *Achmea*,⁴⁸ the ECJ reached the same conclusion, this time, however, in respect of a BIT concluded between two Member States, i.e. the Netherlands and the Slovak Republic (as a successor State to the Czech and Slovak Federative Republic). The BIT contained an arbitration clause entitling an investor from one of those two Member States, in the event of a dispute concerning investments in the other Member State, to bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.

In the case at hand, following the Slovak Republic's decision to liberalise the private sickness insurance sector in 2004, Achmea, a company belonging to a Dutch insurance group, decided to invest in that Member State. However, in 2006, the Slovak Republic reversed the liberalisation of that sector, in particular by prohibiting the distribution of profits generated by private sickness insurance activities. That action caused financial harm to Achmea which decided to bring arbitration proceedings against the Slovak Republic. The parties chose Germany as the place of arbitration, meaning that the law of that Member State applied to those proceedings. The arbitral tribunal ordered the Slovak Republic to pay Achmea damages in the principal amount of EUR 22.1 million. The Slovak Republic challenged that award before the German courts which made a reference to the ECJ, asking, in essence, whether the arbitration clause set out in the BIT was compatible with EU law.

In order to provide an answer to the referring court, the ECJ decided to examine the three following questions: (1) whether the arbitral tribunal mentioned in the BIT was called upon to apply and interpret EU law; (2) whether that tribunal formed part of the EU judicial system, and (3) whether its own case law on commercial arbitration could be applied by analogy to the arbitration proceedings mentioned in the BIT.

First, although the arbitral tribunal was only called upon to rule on possible infringements of the BIT, the ECJ found that, in order for that tribunal to do so, it had to take account of the law applicable in the Contracting Party where the investment was made, including national, EU and international law. This meant that the arbitral tribunal could be called upon to interpret and apply rules and principles of EU law, in particular the freedom of establishment and the free movement of capital.

Second, the ECJ noted that the arbitral tribunal did not form part of the EU judicial system, since the very *raison d'être* of the arbitration clause contained in the BIT was precisely to prevent investor-related disputes from being submitted to the

⁴⁶ *Ibid.*, para. 84.

⁴⁷ *Ibid.*, para. 85.

⁴⁸ *Achmea*, cited above.

courts of the Contracting Parties. As a result, that tribunal could not be classified as a court or tribunal “*of a Member State*” within the meaning of Article 267 TFEU.

Thirdly, the ECJ observed that the arbitral award was final and the question whether that award was subject to review by a court of a Member State – thereby ensuring the potential application of the preliminary reference mechanism – had to be examined in the light of the law of the country chosen as the place of arbitration. For the case at hand, that country was Germany, whose law only provided for limited review of arbitral awards.

At this point, the ECJ drew an important distinction between commercial arbitration proceedings and arbitration proceedings such as those mentioned in the BIT. In relation to commercial arbitration proceedings, which are the result of the express wishes of the parties, the ECJ has held that the efficiency of those proceedings may justify a limited review, “provided that the fundamental provisions of EU law can be examined in the course of that review and, if necessary, be the subject of a reference to the [ECJ] for a preliminary ruling”. By contrast, such considerations could not be applied to the arbitration proceedings mentioned in the BIT. This is because “[those proceedings] derive from a treaty by which Member States agree to remove from the jurisdiction of their own courts, and hence from the [EU] system of judicial remedies [...] disputes which may concern the application or interpretation of EU law”. In view of the ECJ, such removal “could prevent those disputes from being resolved in a manner that ensures the full effectiveness of EU law, even though they might concern the interpretation or application of that law”.⁴⁹ Accordingly, the ECJ ruled that the arbitration clause set out in the BIT had an adverse effect on the autonomy of EU law.

The ruling of the ECJ in *Achmea* is an important development in the case law of the ECJ, both in terms of international investment law and in terms of the law of the EU on remedies. It highlights the distinction between commercial arbitration proceedings and arbitration proceedings provided for in BITs. Most importantly, just as the ECJ ruled in its Opinion 1/09, the autonomy of EU law precludes an international agreement entered into by the Member States the effect of which would be to remove from the jurisdiction of national courts – and thus from the scope of the preliminary reference procedure – disputes that may involve the application and interpretation of EU law. *Achmea* makes absolutely clear that the application of EU law at national level and judicial dialogue must *always* go hand-in-hand.

4 Judicial Independence and Mutual Trust in the AFSJ

In the establishment of an AFSJ, the principle of mutual trust is “of fundamental importance”⁵⁰ since it guarantees that the exercise of free movement does not undermine the effectiveness of the decisions adopted by the competent Member State (whose public power is often exercised on a territorial basis). As internal borders

⁴⁹ Ibid., para. 55.

⁵⁰ Opinion 2/13 (Accession of the European Union to the ECHR), para. 191.

disappear, the principle of mutual trust enables the arm of the law to become longer by acquiring a transnational reach.

In setting up the AFSJ, the authors of the Treaties took the view that national courts were best placed to protect the (fundamental) rights of individuals since they are insulated from political considerations and are, in cooperation with the ECJ, entrusted with the task of upholding the rule of law within the EU. That is why the establishment of the AFSJ is, first and foremost, to be achieved through the mutual recognition of national judicial decisions. Mutual recognition of those decisions implies that the court where recognition and enforcement is sought should trust that the court that adopted the decision in question provided effective judicial protection to the persons concerned by that decision, including, in particular, protection of their fundamental rights.

4.1 Judicial Independence and the Notion of “Court” in the AFSJ

Accordingly, for the purposes of the free movement of judicial decisions, the notion of “court” (or “tribunal”) is of paramount importance, as it is that notion that determines the bodies whose decisions qualify for mutual recognition.

To that effect, the notion of “court” must be construed in the light of the principle of mutual trust. Just like in the context of Article 267 TFEU, this means, in essence, that the notion of “court” within the AFSJ requires the body in question to be impartial and independent. This point is illustrated by looking at the judgments of the ECJ in *Pula Parking* and *Baláž*. Whilst the first case relates to judicial cooperation in civil matters, the latter concerns judicial cooperation in criminal matters.

In *Pula Parking*,⁵¹ the ECJ was asked to interpret the notion of “court” within the meaning of the new Brussels I Regulation.⁵² More specifically, the question that arose was whether, in respect of enforcement proceedings based on an “authentic act”, a Croatian notary could be considered as “a court” within the meaning of that Regulation. The ECJ replied in the negative.

At the outset, the ECJ noted that in the absence of any reference to the law of the Member States, the notion of ‘court’ had to be interpreted autonomously, taking into account the overall scheme, the objectives and the origin of the new Brussels I Regulation.⁵³ It observed that that Regulation sought to facilitate the mutual recognition of judicial decisions in civil and commercial matters as if those decisions had been delivered in the Member State in which enforcement is sought.⁵⁴ In order for

⁵¹ ECJ judgment of 9 March 2017 in case C-551/15, *Pula Parking*, EU:C:2017:193.

⁵² Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2012] OJ L 351/1.

⁵³ *Ibid.*, para. 42.

⁵⁴ *Ibid.*, para. 52.

the Member State of enforcement to treat judicial decisions from other Member States as if they were its own – a degree of equal treatment that unequivocally achieves simplicity and efficiency in the recognition and enforcement of judgments – the ECJ reasoned that there must be mutual trust in the administration of justice in the Union.

Accordingly, “the concept of “court” for the purposes of [the new Brussels I Regulation] must be interpreted as taking account of the need to enable the national courts of the Member States to identify judgments delivered by other Member States’ courts and to proceed, with the expeditiousness required by that regulation, in enforcing those judgments”. Thus, in the key passage of that judgment, the ECJ wrote that “[c]ompliance with the principle of mutual trust in the administration of justice in the Member States of the European Union which underlies that regulation requires, in particular, that judgments the enforcement of which is sought in another Member State have been delivered in court proceedings offering guarantees of independence and impartiality and in compliance with the principle of *audi alteram partem*”.⁵⁵ Put differently, only courts of the Member State of origin that fulfil those guarantees and comply with that principle are worthy of the trust of the courts of the Member State of enforcement.

However, this was not the case as regards Croatian notaries who, apart from the fact that they do not form part of the Croatian judicial system, may issue “a writ of execution based on an ‘authentic document’ [that] is served on the debtor only after the writ has been adopted, without the application by which the matter is raised with the notary having been communicated to the debtor”.⁵⁶ Since the adoption of such a writ fails to comply with the principle of *audi alteram partem*, Croatian notaries could not be seen in this context as “courts” within the meaning of the new Brussels I Regulation.

In *Baláž*,⁵⁷ the ECJ was called upon to interpret the notion of a “court having jurisdiction in particular in criminal matters” for the purposes of Framework Decision 2005/214.⁵⁸ That Framework Decision seeks to establish an effective mechanism for recognition and cross-border execution of final decisions requiring a financial penalty to be paid by a natural person or a legal person following the commission of one of the offences listed in Article 5 thereof. To that end, those decisions may be adopted by an authority other than a court (i.e. an administrative authority), provided that the person concerned has had an opportunity to have the case tried by “a court having jurisdiction in particular in criminal matters”. The ECJ relied on the case law relating to Article 267 TFEU when interpreting the notion of “court” within the meaning of that Framework Decision.⁵⁹ Next, it held that the

⁵⁵ *Ibid.*, para. 54.

⁵⁶ *Ibid.*, para. 57.

⁵⁷ ECJ judgment of 14 November 2013 in case C-60/12, *Baláž*, EU:C:2013:733.

⁵⁸ Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, [2005] OJ L 76/16, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, [2009] OJ L 81/24.

⁵⁹ *Baláž*, cited above, para. 32.

terms “jurisdiction in particular in criminal matters” were to be interpreted bearing in mind that, as regards some of the offences to which Framework Decision 2005/214 applies, the Member States may provide for either administrative or criminal offences. This was the case of the offences at issue in the main proceedings, i.e. offences relating to “conduct which infringes road traffic regulations”. Accordingly, the terms “jurisdiction in particular in criminal matters” not only referred to a court that has jurisdiction in criminal matters alone, but also to a court that applies “a procedure which satisfies the essential characteristics of criminal procedure”.⁶⁰

It follows from the rulings of the ECJ in *Pula Parking* and *Baláz* that there is a degree of consistency between the notion of “court” within the meaning of Article 267 TFEU and that applied in EU legislation adopted in the AFSJ, in so far as those notions both have the requirement of judicial independence as their central feature. Regarding judicial independence, the same consistency applies as between Article 267 TFEU and Article 47 of the Charter. For example, in *El Hassani*, a case concerning the EU Visa Code, the ECJ interpreted the notion of an “independent and impartial tribunal” within the meaning of Article 47 of the Charter by referring to the *Wilson* line of case law.⁶¹ Such overall consistency is a positive development, showing that supranational justice and transnational justice are not applying double standards when it comes to requiring independent courts.

More broadly speaking, when interpreting the notion of “court”, AG Bobek pointed out in *Pula Parking* that “[t]here are good normative and pragmatic reasons not to reinvent the wheel”. “Normatively”, he wrote, “coherency in the law is an important element of predictability and legality”. “Pragmatically speaking”, he argued, “the Article 267 TFEU test already captures quite well the quintessential characteristics of a body of judicial nature that could be referred to as a ‘court or tribunal’”.⁶² Moreover, the reasons put forward by AG Bobek find an echo in the rulings of the ECJ in cases such as *Wilson* and *Torresi*. In those cases, the ECJ gave impetus to this idea of semantic consistency, since they bear witness to interpretative crossover between the notion of “court” within the meaning of Article 267 TFEU and the same notion as applied in secondary EU legislation.⁶³ Furthermore, the EU legislator also favours such consistency.⁶⁴

⁶⁰ *Ibid.*, para. 36.

⁶¹ *El Hassani*, cited above, para. 40. See also Opinion of Advocate General Bobek in *El Hassani*, cited above, EU:C:2017:659, point 121.

⁶² Opinion of Advocate General Bobek in *Pula Parking*, cited above, EU:C:2016:825, point 100.

⁶³ *Wilson*, cited above, paras. 49–52. That judgment does not concern the notion of “court or tribunal” within the meaning of Article 267 TFEU but within the meaning of Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, [1997] OJ L 77/36. However, in *Wilson*, the ECJ explicitly referred to its case law on Article 267 TFEU. *Ibid.*, para. 48. Subsequently, the ECJ applied its main findings in *Wilson* – i.e. that judicial independence has an external and internal aspect – in the context of Article 267 TFEU. See, e.g., ECJ judgment of 17 July 2014 in joined cases C-58/13 and C-59/13, *Torresi*, EU:C:2014:2088, paras 96 and 97.

⁶⁴ ECJ judgment of 31 January 2013 in case C-175/11, *D. and A.*, EU:C:2013:45, para. 81.

However, the principle of mutual trust may set some limits to such consistency. As AG Bobek also noted in *Pula Parking*, “avoiding a complete reinvention of the wheel does not preclude the modification or adaptation of its use”.⁶⁵ In particular, the proper operation of the principle of mutual trust may require the application of a criterion that is not absolute under Article 267 TFEU.⁶⁶ This is the case of the principle of *audi alteram partem*, compliance with which is not mandatory under that Treaty provision, but is considered to be absolute in order for courts to trust each other in the context of the new Brussels I Regulation. Indeed, whilst “it may well be in the interests of the proper administration of justice for a preliminary question not to be referred until after an inter partes hearing, ... it must be recognized that the existence of an inter partes hearing does not appear among the conditions required to implement the procedure under Article [267 TFEU, since] it is for the national court alone to assess the need to hear the defendant before making an order for reference”.⁶⁷ By contrast, since it is precisely the proper administration of justice that facilitates mutual trust between the courts of different Member States, the application of mutual recognition in the context of the new Brussels I Regulation requires such an inter partes hearing.

4.2 *Judicial Independence and the Notion of ‘Judicial Authority’ in the Context of the European Arrest Warrant*

The EU legislator may decide to apply the principle of mutual recognition not only to decisions adopted by courts but also by authorities that participate in the administration of criminal justice. This is the case of the European Arrest Warrant Framework Decision,⁶⁸ which provides that in order for an EAW to be enforced and recognised in the executing Member State, such an arrest warrant must be issued by a “judicial authority”, understood as an authority that is independent from the executive.⁶⁹ This is because the mutual recognition of EAWs is predicated on a high level of trust that is not justified unless the issuing of an arrest warrant is subject to judicial approval. This was made clear by the ECJ in a series of cases dealt with under

⁶⁵ Opinion of Advocate General Bobek in *Pula Parking*, cited above, point 102.

⁶⁶ See, e.g., ECJ judgment of 25 June 2009 in case C-14/08, *Roda Golf & Beach Resort*, EU:C:2009:395, paras 33–34.

⁶⁷ See ECJ judgment of 3 March 1994 in joined cases C-332/92, C-333/92 and C-335/92, *Eurico Italia and Others*, EU:C:1994:79, para. 11.

⁶⁸ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, [2002] OJ L 190/1, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, [2009] OJ L 81/24.

⁶⁹ See ECJ judgments of 10 November 2016 in case C-452/16 PPU, *Poltorak*, EU:C:2016:858; in case C-477/16 PPU, *Kovalkovas*, EU:C:2016:861, and in case C-453/16 PPU, *Özçelik*, EU:C:2016:860.

the urgent preliminary procedure that were decided on the same day, i.e. *Poltorak*, *Kovalkovas*, and *Özçelik*.

Those three cases involved, respectively, the execution of an EAW issued by the Swedish police board for the purposes of executing a custodial sentence, that of an EAW issued by the Lithuanian Ministry of Justice for the purposes of executing a custodial sentence, and that of an EAW issued in the context of criminal proceedings by the Hungarian police and confirmed by the Hungarian public prosecutor's office ("PPO").

In *Poltorak*, the case concerning the EAW issued by the Swedish police board, the ECJ examined the term "judicial authority" as set out in Article 6(1) of the EAW Framework Decision, a provision that states that "[t]he issuing judicial authority shall be the judicial authority of the issuing Member State which is competent to issue [an EAW] by virtue of the law of that State".

At the outset, the ECJ held that the reference made to the law of the issuing Member State is limited to the designation of the judicial authority having the competence to issue EAWs. Accordingly, that reference does not concern the definition of the term "judicial authority" itself. This is because the meaning and scope of that term could not be left to the assessment of each Member State but rather required an autonomous and uniform interpretation.⁷⁰ In that regard, the ECJ relied on a textual, contextual and teleological interpretation of Article 6(1) of the EAW Framework Decision in order to give meaning to that term.

Textually, the ECJ observed that the words "judicial authority", contained in that provision, are not limited to designating only the judges or courts of a Member State, but may extend, more broadly, to the authorities required to participate in administering criminal justice in the legal system concerned.⁷¹ However, it also noted that it is generally accepted that the term "judiciary" does not cover police services. That term refers to the judiciary, which must be distinguished, in accordance with the principle of the separation of powers which is intimately connected to the operation of the rule of law, from the executive. Thus, judicial authorities are traditionally those authorities that administer justice, unlike, *inter alia*, administrative authorities or police authorities, which fall within the sphere of the executive.⁷²

Contextually, when the EAW Framework Decision was adopted, the Treaties themselves drew a distinction between police cooperation and judicial cooperation in criminal matters, as each type of cooperation was defined in a separate Treaty provision, namely ex Articles 30 and 31 EU.⁷³

Teleologically, the principle of mutual recognition – as given concrete expression in the context of the EAW – operates on the premise that a judicial authority has intervened prior to the execution of the EAW. This is because it is such judicial

⁷⁰ *Poltorak*, cited above, para. 32.

⁷¹ *Ibid.*, para. 33.

⁷² *Ibid.*, paras. 34 and 35.

⁷³ *Ibid.*, para. 37. Currently, each type of cooperation is defined in a separate Chapter of the Title relating to the AFSJ (i.e. Title V of Part Three of the TFEU), namely Chapter 4 (Articles 82 to 86 TFEU) for judicial cooperation and Chapter 5 (Articles 87 and 88 TFEU) for police cooperation.

intervention that justifies the high level of trust between the Member States that is required for the successful operation of that principle.⁷⁴

As a result, the ECJ ruled that the term “judicial authority”, within the meaning of the EAW Framework Decision, must be interpreted as meaning that police services are not covered by that term. Nor can an EAW issued by such services be regarded as a “judicial decision” within the meaning of that Framework Decision.

Similarly, in *Kovalkovas*, the case concerning the EAW issued by the Lithuanian Ministry of Justice, the ECJ found that such an EAW was not to be regarded as issued by a “judicial authority”. Nor could it be regarded as a “judicial decision” within the meaning of the EAW Framework Decision. That was so because it was ultimately for the Ministry of Justice to take a decision on issuing the EAW and not for the judge imposing the custodial sentence.⁷⁵ Accordingly, such a decision was not subject to judicial approval.

By contrast, in *Özçelik*, the case concerning the EAW issued by the Hungarian police and confirmed by the Hungarian PPO, the questions referred focused on the term “judicial decision” rather than on the term “judicial authority”. However, that made no difference. In order to ensure consistency between the various provisions of the EAW Framework Decision, the ECJ held that the same rationale applied. This meant that the term “judicial decision” covered decisions of the Member State authorities that administer criminal justice, but not police services.

In the *Özçelik* case, the intervention of the PPO proved, however, to be decisive. Under Hungarian law, the PPO verifies and validates the arrest warrant issued by the police, so that it is that office that is to be assimilated with the issuer of that arrest warrant. Recalling its previous case law, the ECJ found that the PPO constitutes a Member State authority for the purposes of administering criminal justice.⁷⁶ Thus, unlike the EAWs issued in *Poltorak* and *Kovalkovas*, the ECJ found that the EAW issued by the Hungarian police and confirmed by the PPO constituted a “judicial decision” within the meaning of the EAW Framework Decision.

As pointed out by AG Campos Sánchez-Bordona, it seems that the notion of “judicial authority” is broader than that of “court or tribunal” within the meaning of Article 267 TFEU. Indeed, the PPO may not make a reference to the ECJ, since it is not called upon “to rule on an issue in complete independence but, acting as prosecutor in the proceedings, to submit that issue, if appropriate, for consideration by the competent judicial body”.⁷⁷ The fact that the EU legislator opted for the concept of “judicial authority” instead of that of “court” may be explained by the fact that EU law allows room for diversity in the criminal procedural law of the Member

⁷⁴ *Ibid.*, paras 44 and 45.

⁷⁵ *Kovalkovas*, cited above, para. 47.

⁷⁶ *Özçelik*, cited above, para. 34 (referring to ECJ judgment of 29 June 2016 in case C-486/14, *Kossowski*, EU:C:2016:483, para. 39).

⁷⁷ Opinion of Advocate General Campos Sánchez-Bordona in *Özçelik*, cited above, EU:C:2016:783, point 62 (referring to ECJ judgment of 12 December 1996 in joined cases C-74/95 and C-129/95, *X*, EU:C:1996:491, para. 19).

States when it comes to choosing between the inquisitorial and adversarial criminal systems, the latter giving a more prominent role to an authority such as the PPO than the former. However, extending the application of the principle of mutual recognition beyond the notion of “courts” requires compliance with the principle of mutual trust. This meant, in *Özçelik*, that the EAWs confirmed by the PPO could only benefit from free movement because that office was independent from the executive and participated in the administration of justice.

5 Concluding Remarks

It follows from the foregoing paragraphs that the notion of “court or tribunal” set out in Article 267 TFEU provides the ECJ with the general framework of analysis that facilitates the interpretation of that same notion in different normative contexts. Whilst such a framework may guarantee normative consistency, its application must be subject to some degree of flexibility in order to allow the ECJ to interpret the notion of “court” in the light of the objectives pursued by the EU act in question. In the AFSJ, this means, as the ruling of the ECJ in *Pula Parking* shows, that the notion of “court” must be construed, first and foremost, in keeping with the principle of mutual trust.

That said, that degree of flexibility does not affect judicial independence, since, in the EU legal order, a “court” is *always* to be understood as meaning an “independent court”. Judicial independence is thus a prerequisite for any “court” that wishes to engage in a dialogue with the ECJ and with sister courts in other Member States. From a supranational perspective, independent courts guarantee the effective and loyal application of EU law, as interpreted by the ECJ. From a transnational perspective, mutual trust between national courts can only take place where those courts are independent, as only then will those courts see each other as equals.

Since the enforcement of EU law is decentralised, the entire EU system of judicial protection is thus predicated on the premise that the Member States enjoy and cherish an independent judiciary that is capable of providing effective judicial protection of EU rights. However, where that premise no longer holds true, i.e. where judicial independence is lacking, the preliminary reference procedure becomes devoid of purpose, and the principle of mutual trust no more than an empty promise. Should that happen, then a link in the chain of European justice would be broken and the rule of law within Europe as a whole would inevitably be weakened as a result.

That is the reason why, in the fields covered by EU law, the second subparagraph of Article 19(1) TEU imposes on the Member States the obligation to refrain from adopting any measures that may threaten the independence of their own judiciaries. Any such measures are repugnant to the values on which the EU is founded and must be set aside. Thus, as the ruling in *Associação Sindical dos Juízes Portugueses* shows, the ECJ, as the ultimate guarantor of the rule of law within the EU, is

genuinely committed to preserving the independence of the Member State judiciaries. The reason is simple: without it, justice will not prevail, be it from a national, a supranational, or a transnational perspective.

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Joint Dispute Settlement and Judicial Interpretation – A Precondition for Participation in the EU Internal Market?



Sven Norberg

*Laws and institutions must go hand in hand
with the progress of human mind.*

- Thomas Jefferson

1 Introduction

Professor Carl Baudenbacher was sworn in as Judge of the EFTA Court on 6 September 1995 and became its President on 15 January 2003. During his more than twenty-two and a half years at the Court he has not spared any efforts always to secure the highest quality and standard in the Court's work. Thanks to Carl's very personal engagement and devotion to the objectives of the EEA Agreement, the Court has been extremely successful, over all these years, through the exercise of its crucial judicial activity in maintaining the credibility both of the EFTA pillar in the EEA, as well as of the EEA as a whole. It is with the greatest admiration and humility that in honour of my great friend Carl Baudenbacher I address an issue that is at the very core of the EEA but so far does not seem to have attracted the attention it deserves in the ongoing Brexit negotiations.

Since June 2017, the United Kingdom, on the one hand, and the European Union ("EU") and its 27 Member States, on the other, are deeply engaged in both sorting out the conditions for the British departure from the EU by 29 March 2019, and in drawing up the terms for their future relationship, following the expiry of any transitional period that the parties may agree upon.

The British side has so far rejected, that any of the existing examples of EU negotiated arrangements could serve as a model for the UK-EU relationship. This concerns the Agreement on the European Economic Area ("EEA"), the EU-Turkey

Former Judge of the EFTA Court.

S. Norberg (✉)
Nyon, Switzerland

Association with Customs Union, the Comprehensive Economic and Trade Agreement EU-Canada (“CETA”), Deep and Comprehensive Trade Agreements (“DCFTAs”) between EU and Ukraine, Georgia and Moldavia, as well as the EU’s arrangements with Switzerland. However, apart from stating that there should be a deep and special relationship for trade in goods and services and that there should be no more role for the Court of Justice of the European Union (“CJEU”) in relation to UK, the British Government has, so far, not been more specific regarding its future relationship with the EU.

The purpose of this article is to look at and examine more closely the most advanced of these earlier precedents from an EU law point of view. Leaving the UK Government’s view to one side, this article will take a closer look to the reasons that lead the EU and EFTA States to settle for the institutional solutions laid down in the EEA Agreement: the Agreement which is the one that by far comes closest to a full membership of the EU and the only one that in practice provides membership of the Single Market.

Switzerland was one of the original EFTA signatories to the EEA Agreement,¹ but after a referendum on 6 December 1992, where a tiny majority of the population, but a clear majority of the cantons, had voted “no” to Swiss ratification of the EEA, it was decided to proceed with a more traditional Swiss model by seeking to negotiate a series of bilateral sectoral agreements with the EU. The Swiss case also very well illustrates the institutional difficulties, obstacles and limits of such an approach.

Initially the particular character of the EU must be recalled as a Union of law, where the guarantees for legal certainty and non-discrimination are particularly strong not only for the EU Member States but also for their citizens. It is recalled that overcoming the *risk of a legal imbalance* arising between the EU and the EFTA States in the EEA became a major objective in the EEA negotiations 25 years ago.²

2 The Road Leading to the European Economic Area

2.1 EFTA and FINEFTA

EFTA was created in 1960 by Austria, Denmark, Norway, Portugal, Sweden, Switzerland and the United Kingdom as a reaction to the foundation of the European Economic Community (“EEC”) by Belgium, France, Germany, Italy, Luxembourg and the Netherlands through the Treaty of Rome 1957. The purpose of EFTA was, however, limited to creating a free trade area for trade in industrial goods, which objective was achieved in 1966. In 1961 FINEFTA was created as an Association

¹The Swiss Federal Council had also on 16 May 1992 submitted an application for EC membership. After the vote on the EEA the application was suspended, but only finally withdrawn on 27 July 2016.

²See Sect. 4 below.

between the EFTA States and Finland, whereby in principle free trade was created with Finland to the same extent as within EFTA.³

The essential provisions of the EFTA Convention for more than 40 years mainly dealt with free trade in industrial goods, i.e. provisions prohibiting tariffs and quotas. With the Vaduz Convention 2001 concluded between the four remaining EFTA States the scope was widened both substantially and politically.

2.2 *The EFTA-EC Free Trade Agreements*

When Denmark and the UK were to leave EFTA to join the EC in 1973, it became vital both for the two leaving EFTA States and the remaining seven not to give up the considerable trade liberalization that had been achieved since 1960. “Free trade once achieved must never be given up” was the firm principle that led the EC to accept to conclude the first Free Trade Agreements (“FTAs”) in industrial goods in its history. Thus in 1972 and 1973 14 FTAs were concluded, one between each of the seven EFTA States and the EEC as well as the European Coal and Steel Community (“ECSC”). The FTAs were identical but separate. Full free trade under these FTAs was achieved between the EC and EFTA after 10 years in 1983. In 1994, the FTAs were replaced by the EEA Agreement for all EFTA States bar Switzerland. The Swiss FTA is still in force and provides the basic rules regarding free trade in industrial goods between the EU and Switzerland.

A Joint Committee, where both parties to the FTA are represented, takes decisions by unanimity. No other provisions exist for the settlement of disputes that may arise between the parties.

Through two judgments in the form of preliminary rulings in the *Kupferberg*⁴ and *Polydor*⁵ cases, the European Court of Justice (“ECJ”) gave these agreements an entirely new dimension, that hardly could have been foreseen, when they were negotiated 10 years earlier. In these judgments the ECJ established that once in force the agreements did not only become an integral part of Community law. They had also become directly applicable and the provisions therein, to the extent that their wording was sufficiently clear and precise, could have direct effect.⁶

By this development, it became clear that provisions of central importance to the free trade like those on abolition of tariffs and quotas on industrial goods could be invoked by EFTA citizens and economic operators against non-complying EC

³Iceland joined EFTA in 1970, Denmark and the UK left to join the EC in 1973, Portugal joined the EC and Finland became full Member of EFTA in 1986. Liechtenstein joined EFTA in 1991, and Austria, Finland and Sweden left to join the EU in 1995.

⁴Case 104/81, *Hauptzollamt Mainz v. Kupferberg* [1982] ECR 3641.

⁵Case 270/80, *Polydor Ltd. and others v. Harlequin Record Shops Ltd. and others*, [1982] ECR 329.

⁶Cf. also cases 181/73, *Haegeman v. Belgian State*, [1974] ECR 499, and 82/75, *Bresciani v. Amministrazione Italiana delle Finanze*, [1976] ECR 129.

Member States before national courts and finally before the ECJ, which were obliged to recognize the rights of the claimants that under EC law were derived from these agreements. This would also, as shown in the following, have a decisive importance for the development of the EFTA States new relationship with the EU through the EEA.

3 The EEA Agreement

3.1 *Substance: The Four Freedoms of the Internal Market*

When signing the EEA Agreement in Oporto on 2 May 1992, the original contracting parties, the EU and its then twelve Member States, on the one hand, and the then seven EFTA States, on the other,⁷ set out to create a “substantially improved Free Trade Area,”⁸ where all the relevant *acquis communautaire* regarding the four freedoms of the Internal Market would apply. A great number of “*horizontal and flanking policies*”, e.g. company law, research and development, education, consumer protection, environmental, concerning small and medium sized enterprises (“SMEs”), as well as the social dimension were also included. However, the EEA does not contain any common trade policy, no common agricultural or fisheries policies, no transport or taxation policies. As for trade in agricultural goods and fisheries, a number of bilateral agreements have been concluded.

This means that today, 26 years later, the EEA Agreement has incorporated more than 9,000 EU legal acts (at signature 1,845). The original dominance of Directives has been replaced by that of Regulations (75%).

3.2 *Institutions: The Two-Pillar Structure*

The special characteristic of the EEA is its institutional “*two-pillar structure*”, where there are two institutional set-ups, one for the EU and its Member States, and one for the EFTA States. This means that for the EU and its Member States it is the EU Commission and the CJEU, which are in charge for monitoring the application of the Agreement and interpreting its provisions. For the EFTA States, the EEA required the establishment of two new supranational institutions, the EFTA

⁷EFTA as such is not a party to the EEA.

⁸Article 1.1 EEA reads: “The aim of this Agreement of association is to promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties with equal conditions for competition, and the respect of the same rules, with a view of creating a homogeneous European Economic Area, hereinafter referred to as the EEA.”

Surveillance Authority (“ESA”) and the EFTA Court with corresponding mandates to those of the EU Commission (as to surveillance) and the CJEU. This was done through a special agreement between the EFTA States: the Surveillance and Court Agreement (“SCA”).⁹

As to the joint decision-making under the EEA Agreement, the EEA Joint Committee is in charge of the its day-to-day operation, as well as of taking over new EU *acquis* into the Agreement. There is also an EEA Council, which meets at Ministerial level, as well as an EEA Joint Parliamentary Committee, and an EEA Joint Consultative Committee. Article 102 EEA regulates the procedure for taking on new *acquis*, where not only the EU side, but also the EFTA side, has to act with one voice.

Dispute settlement between Contracting Parties on the two sides is to be handled by the EEA Joint Committee (Article 111 EEA) and ultimately, if no agreement can be reached, there remains only safeguard measures.

3.3 *A Dynamic and Homogeneous EEA*

3.3.1 The Homogeneity Objective

The two adjectives “*dynamic and homogeneous*” are more than anything else characteristic of the EEA. The EEA is applicable in relations between the EU and its Member States, on the one, and the participating EFTA States, on the other side, as well as in relations between the latter. The real challenge for this extremely ambitious project was thus to create a treaty that can be operated in such a way that the objective of maintaining the *homogeneous* nature of EEA provisions can be achieved in relation to the corresponding provisions of the EU Internal Market, while the latter is under constant development.

The successful operation of the EEA since its entry into force on 1 January 1994 has proven that this objective, which at the time was met by considerable scepticism, not only could, but also has been achieved. Without going into all the details of how this was done in the Agreement,¹⁰ a summary of the various means applied is set out below.

To start with, after serious discussions it was agreed that the provisions of the EEA Agreement *copy the main articles of the EEC Treaty* and thus to refrain from any attempts to try to codify almost 35 years of case law developed by the ECJ in its interpretation thereof. If this would not have been done, one would certainly have arrived at two different sets of rules, which never could have been applied in a

⁹The Agreement of 2 May 1992 between the EFTA States on the establishment of a surveillance authority and a court of justice.

¹⁰For a more extensive description of this reference is made to Chapter IX, Methods of Ensuring a Homogeneous EEA in Norberg et al. (1993).

homogeneous way. For the incorporation of the numerous legal acts of EC secondary law, such as directives and regulations, a *special drafting technique* was used by which the EC Acts were taken over through both a special reference technique and by elaborating horizontal adaptations of all these acts.¹¹ This was done in order to reduce both the volume of texts and the number of technical modifications thereto as far as possible.

The Preamble to the EEA Agreement contains important expressions of the political ambitions and objectives of the Contracting Parties. After the introductory recitals enumerating the Contracting Parties there are sixteen recitals, where certain major principles and objectives of the creation of the EEA are expressed.

In a first Opinion of 14 December 1991,¹² the ECJ declared that “the judicial supervision which the agreement proposes to set up is incompatible with the Treaty establishing the European Economic Community”. However, within 2 months the parties had renegotiated the institutional provisions of the Agreement and in place of a joint EEA Court¹³ an EFTA Court should be created for the EFTA States in the EFTA pillar with parallel competences to those of the ECJ. In addition, the homogeneity objective was further emphasized in several places.¹⁴

It is worthy of mentioning in particular the new fifteenth recital in the *Preamble* and *Chapter 3 Homogeneity, surveillance procedure and settlement of disputes*. The fifteenth recital reads:

Whereas, in full deference to the independence of the courts, the objective of the Contracting Parties is to arrive at, and maintain, a uniform interpretation and application of this Agreement and those provisions of Community legislation which are substantially reproduced in this Agreement and to arrive at an equal treatment of individuals and economic operators as regards the four freedoms and the conditions for competition.

This recital is an expression of the fact that, while formally-speaking, there are two separate but parallel legal orders, EU law and EEA law, these will in practice together form a common European legal system.

In addition, the parties added to the EEA Agreement in *Part VII Institutional Provisions in Chapter 3* a new *Section 1 Homogeneity*, consisting of Articles 105–107 EEA, before the Sections on the surveillance procedure and on the settlement of disputes. The principle of homogeneity is not only a principle of law but to the fullest possible extent a “*political principle*”, expressing the Parties’ overarching political objectives.

¹¹ These are laid down in Protocol 1 to the EEA Agreement on Horizontal Adaptations.

¹² Opinion 1/91 ECR [1991] 6079.

¹³ This should have been integrated with the ECJ and composed of five ECJ judges and three out of seven EFTA judges.

¹⁴ In Opinion 1/92 [1992] ECR I-2821 on 10 April 1992 the ECJ gave its green light to the revised Agreement.

3.3.2 Relevance of CJEU Case Law

Following the decision as far as possible to take over word by word the provisions of the Treaty of Rome into the EEA Agreement, it was obvious that there had to be provisions regarding the taking over the ECJ case law up to the signature of the EEA Agreement. This was taken care of by Article 6 EEA, which reads:

Without prejudice to future developments of case law, the provisions of this Agreement, in so far as they are identical in substance to corresponding rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community and to acts adopted in application of these two Treaties, shall in their implementation and application be interpreted in conformity with the relevant rulings of the Court of Justice of the European Communities given prior to the signature of this Agreement.¹⁵

As the homogeneous application of the common rules is undoubtedly the most essential obligation of the Agreement, the importance of Article 6 EEA cannot be sufficiently underlined. This question was one of the most difficult and delicate to handle during the negotiations.

The solution laid down in Article 6 EEA is inspired by – but is far more far-reaching than – corresponding solutions elaborated a few years earlier in the Lugano Convention 1988,¹⁶ which was parallel to, and essentially reproduced the text of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

The problems in connection with the Lugano Convention arose from the fact that, while for the EC Member States the task to interpret the Brussels Convention, as well as the new parallel Lugano Convention, ultimately fell upon the ECJ, nothing similar existed for the EFTA States. To overcome this dilemma, the Parties first agreed on the objective of preventing divergent interpretations and to arrive at as uniform interpretation as possible of the two conventions. At the same time, they underlined that this should be done “*in full deference to the independence of courts*”. This was then laid down in the Preamble¹⁷ to Protocol 2 on Uniform interpretation of the Convention. The first Article of this Protocol then states that the Courts of each Contracting State shall when applying and interpreting the provisions of the Convention, “*pay due account to the principles laid down by any relevant decision delivered by courts of the other Contracting States concerning provisions of this Convention*”.

Regarding this Protocol separate Declarations were also made, one by the EC Member States and one by the EFTA States. The former declared that they considered as appropriate that the ECJ, when interpreting the Brussels Convention, pay due account to the rulings contained in the case law of the Brussels Convention. The EFTA States, meanwhile, declared that they considered as appropriate that their

¹⁵ The EEA Agreement was signed in Oporto on 2 May 1992.

¹⁶ Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters done at Lugano on 16 September 1988.

¹⁷ Sixth recital of the Preamble.

courts, when interpreting the Lugano Convention, pay due account to the rulings contained in the case law of the ECJ and of the Courts of the EC Member States in respect of the provisions of the Brussels Convention which are substantially reproduced in the Lugano Convention.

As to the further developments of case law after the signature of the EEA Agreement, there were for the EFTA Contracting Parties both constitutional and political obstacles to accepting a treaty obligation regarding the acceptance of future judgments rendered by a “foreign” court. In view of the fundamental interest, especially in the absence of a joint mechanism, to keep future interpretations of mirroring EC and EEA rules as uniform as possible, while at the same time preserving the autonomy of the EFTA States and their judicial systems, Article 6 had to be supplemented by other means. Apart from the already mentioned fifteenth recital in the Preamble and Section 1 of Chapter 3 of Part VII, reference should also be made to Article 3 SCA. This provision is in its first paragraph identical to Article 6 EEA, but contains in its second paragraph an obligation for the ESA and the EFTA Court also to *take due account* of future case law of the ECJ. As can be seen this wording is also inspired by language from Protocol 2 to the Lugano Convention.

3.3.3 Legal Effects of EU Acts Taken Over in the Agreement

Article 7 EEA reads:

Acts referred to or contained in the Annexes to this Agreement or in decisions of the EEA Joint Committee shall be binding upon the Contracting Parties and be, or be made, part of their internal legal order as follows:

- (a) an act corresponding to an EEC regulation shall as such be made part of the internal legal order of the Contracting Parties;
- (b) an act corresponding to an EEC directive shall leave the authorities of the Contracting Parties the choice of form and method of implementation.

Such a provision was necessary not only in order to secure the correct implementation of these rules in the Contracting Parties but also in order to avoid, *inter alia*, that, due to the public international law character of the Agreement, especially in monist Contracting Parties, acts corresponding to EEC directives would become more binding under EEA law than the EEC directives under EC law in EC Member States.

Article 7 EEA is modelled on Article 189 EEC (now Article 288 TFEU) and reiterates the legally binding nature of the secondary EC legislation as integrated into the Agreement through the references listed in the Annexes or, with regard to the future, through decisions of the EEA Joint Committee. Article 7 EEA furthermore lays down the obligations for the Contracting Parties to see to it that the Community acts are made part of the legal system of the Contracting Parties in an appropriate manner, and that this shall be done in a way which as closely as possible corresponds to that in the EU.

The aim of Article 7 EEA is to ensure the legal homogeneity within the EEA, i.e. that the acts referred to in the Annexes in practice produce the same legal results in the entire European Economic Area, in both the EFTA States as well as in the Community.

Article 7 EEA is supplemented by Protocol 35 on the implementation of EEA rules. The sole article of this Protocol reads:

For cases of possible conflicts between implemented EEA rules and other statutory provisions, the EFTA States undertake to introduce, if necessary, a statutory provision to the effect that EEA rules prevail in these cases.¹⁸

From this Protocol follows that if existing principles are not sufficient to ensure that the implemented EEA rules prevail, the EFTA States are obliged to take further measures.

4 Negotiating EEA: Main Challenges

4.1 Substance

The objective of the EEA was soon established as being to achieve the fullest possible realization of the free movement of goods, services, capital and persons with the relevant *acquis communautaire* as a common legal basis for the EEA. This meant an end to the “cherry-picking” of subjects for co-operation. When the preparations for the formal negotiations were initiated in the spring of 1989, the EFTA States were met by the surprise that they would now be obliged to take over the full *acquis communautaire* in all areas of the Internal Market of relevance for the EEA. This would apply *also in the future* to new EC acts or amendments to the *acquis*. Exceptions would not be possible and transitional periods could only be considered if there were very serious difficulties. All this meant for the negotiations that the traditional *bottom-up* approach mostly used in international negotiations now was replaced by a *top-down* approach, whereby decisions regarding substance were taken at the political level and with the implementation thereof being left to the expert level.

¹⁸In relation to Protocol 35 there is a Joint declaration, contained in the Final Act to the EEA Agreement, where the Contracting Parties have expressed their understanding that Protocol 35 does not restrict the effects of those existing internal rules which provide for direct effect and primacy of international agreements.

4.2 Institutional

4.2.1 Legal Imbalance between the EC and EFTA Unacceptable

While the EC had special supranational institutions for monitoring the application of Treaty rules (the Commission) and for their interpretation (the ECJ), the EFTA side had nothing similar. In addition, most EFTA States followed a dualistic legal tradition as to the role of international treaties in national law. The ECJ's judgments in *Kupferberg* and *Polydor*¹⁹ had, however, shown that the FTAs between the EC and the EFTA States as forming part of Community law were directly applicable and that sufficiently precise and clear provisions therein also could produce direct effect in the EC, if invoked by EFTA individuals and economic operators. Nothing comparable existed to guarantee that the rights of EC subjects would be safeguarded in the EFTA States. In the beginning of 1988 the Commission had thus warned its Member States for the considerable risks of such a *legal imbalance* in a future more elaborated relationship with the EFTA States. Since national courts or institutions never could replace such supranational institutions as the Commission and the ECJ, the EFTA side would also have to create similar institutions for its pillar in the EEA. This was made clear very early during the formal negotiations. The establishment of the EFTA Surveillance Authority was also agreed at an early stage, while the creation of the EFTA Court became a reality only after the ECJ's rejection of the setting up of a joint EEA Court that the parties had agreed upon in the first draft of the EEA Agreement.²⁰

4.2.2 Securing the Maintenance of the Dynamic and Homogeneous EEA

In order to guarantee that the EEA would develop in parallel to the Internal Market, it would also be necessary to incorporate without delay new EC acts or amendments to such acts.

Towards the end of 1987 the Commission had been very close to making a fatal mistake, when preparing the conclusion, after 17 years, of the negotiations with Switzerland on an agreement opening up the market for non-life insurance. Someone in the Commission Legal Service discovered that the EC through the draft agreement risked making further developments of its legislation in this field conditional upon an approval by Switzerland. Thus was invented the so-called "*clause d'autodestruction*", also later referred to as "*clause de guillotine*", which would

¹⁹ Cf. notes 4 and 5 above.

²⁰ Cf. Opinion 1/91 and note 12 above.

result in the whole agreement being terminated, if Switzerland would not accept an amendment that the EC had adopted for its part.²¹

It was also stated in the mandate for the EC negotiators by the European Parliament and the Council, that the EEA Agreement should contain a corresponding “*clause de guillotine*”. However, the more progress was made during the EEA negotiations, the more it was realised on the EC side, that it would not be in anyone’s interest to let this the most extensive and voluminous agreement ever negotiated with a third State simply to be destroyed in its entirety for a failure to agree on what might be only a minor piece of legislation. Thus Article 102 EEA (in Chapter 2 The decision-making procedure of Part VII Institutional Provisions) was created. It is a very long provision of six subparagraphs, laying down a very drawn out and detailed procedure in case there would be such a failure in the EEA Joint Committee to reach an agreement. This procedure finally ends, unless the Joint Committee would not decide otherwise, with a decision on the provisional suspension of the part of an Annex to the Agreement that is affected by the new amendment.²² To date, no such provisional suspension has been decided upon.

As explained above at Sect. 3.3, the further developments of case law regarding the Internal Market after the signature of the EEA Agreement is dealt with in Article 6 EEA, as well as in Article 3 SCA. It is worthwhile to underline that, as shown in practice by the case law of the CJEU, this is not a one-way street. On the contrary, it works in both directions as the CJEU and the General Court frequently refer to the judgments of the EFTA Court. Thus, until a year ago there had been such references made in more than 233 cases by Advocates General, the CJEU and the General Court.²³ In this context should also be mentioned the Declaration to the Final Act by the EC on the rights for the EFTA States before the ECJ, whereby the EC undertook to amend the Statute of the Court to open intervention possibilities as well as possibilities to submit opinions when references for preliminary rulings are made. Such possibilities are also granted before the EFTA Court to the Commission, other EU institutions and EU Member States.

To sum up, the overall main challenges arise from the fact that the EEA Agreement has created a new legal order, EEA law, that is parallel to and mirrors EU law and which, in areas covered by both legal orders, delivers the same result as EU law, to the benefit of individuals and economic operators across the whole of the EEA.

²¹ Cf. Art. 39.8 of the Agreement of 10 October 1989 between the European Economic Community and the Swiss Confederation concerning direct insurance other than life insurance, which entered into force in the beginning of 1993. While practically unchanged since then, updating amendments are now being prepared (SuisseEurope, Edition II/2018-März/mars p. 9, www.eda.admin.ch/europa/suisseurope).

²² Article 102.5.

²³ This number mentioned by Carl Baudenbacher, President of the EFTA Court, in his presentation at the First Judicial Summit of the EFTA Pillar, Luxembourg, 2 May 2017, is now even higher.

5 What About the EU-Swiss Arrangements?

5.1 Substance

Free trade in industrial goods existed already between the EEC and Switzerland under the 1972 FTA.²⁴ In addition, Switzerland has concluded a great number of bilateral agreements regarding in particular various food products, such as cheese and “*viande séchée*”. The 1989 non-life insurance agreement has already been mentioned.²⁵ Since 1990, Switzerland has also had an Agreement on the facilitation of customs procedures and security for goods transports with the EEC.

An important ambition of the Swiss EU policy has been to participate in selected areas of the Single Market. This has resulted in the conclusion of two sets of bilateral agreements between the EU and Switzerland, *Bilaterals I* and *Bilaterals II*, which came into force in 2002 and 2005, respectively.

The *Bilaterals I*, signed in 1999, is composed of seven sectoral agreements on free movement of persons, technical barriers to trade (“TBTs”) based on mutual recognition, public procurement, agriculture, civil aviation, road transport and research. All agreements are legally interrelated, meaning that the “seven agreements are intimately linked to one another by the requirement that they are to come into force at the same time and that they are to cease to apply at the same time, six months after the receipt of a non-renewal or denunciation notice concerning anyone of them.”²⁶

The *Bilaterals II* package is composed of nine sectoral agreements signed in 2004 and came into force in 2005. Negotiations on an agreement regarding services was suspended at an early stage. The nine agreements concern: the Schengen/Dublin Conventions, taxation on savings, fight against fraud, processed agricultural products, media, environment, statistics, pensions and education, vocational training and youth.

The great majority of the bilateral agreements fall in general into one of three kinds:

- 1) those that provide for *mutual recognition* of equivalence of legislation;
- 2) those where *acquis communautaire* in a special field is adopted; and
- 3) those which provide for *cooperation* with EU programmes and agencies.

Although altogether the scope of the numerous Swiss arrangements with the EU is considerably less comprehensive than that of the EEA, it nevertheless allows Switzerland a certain participation in the Single Market, especially in the field of trade in industrial goods and in the free movement of persons. The failure to reach a more general agreement regarding services, which would seem mainly to be caused by a Swiss unwillingness to develop the institutional structure of the

²⁴ Cf. under Sect. 2.2 above.

²⁵ Cf. Sect. 4 above.

²⁶ Cf. EU Council and Commission Decision of 4.4.2002, EU OJ L 114/1.

relationship, has evidently been a major disappointment, not the least for the Swiss financial sector.

5.2 *Institutional Aspects*

All these EU-Swiss agreements are expressions of a classical form of intergovernmental cooperation. There has been no transfer of legal or decision-making power to a supranational body. The only exception concerns competition in the field of civil aviation, where the sole competent institutions are the EU Commission and the CJEU.

Each bilateral agreement is administered by a separate Joint Committee. Amendments to these agreements are made by joint agreement of the Contracting Parties with ratification requirements etc. The Joint Committees are only competent for making technical up-dates, e.g. listing laws, authorities or products. While the fulfilment of the treaty obligations on the EU side is monitored by the EU Commission and ultimately by the CJEU, nothing corresponding exists on the Swiss side.²⁷ In the absence of any separate dispute settlement mechanism the responsibility falls upon each Joint Committee, which can only act by consensus between the two sides, to try to seek a solution.

That the EU originally accepted this piece-meal approach may be explained by expectations at the time that this would form a step in Switzerland's deeper integration with the EU. However, it soon became obvious that Switzerland was not contemplating to accede to the EEA, let alone EU membership.²⁸ At the same time, it became clear that the administration of numerous bilateral agreements, each with a separate joint committee, in combination with extended ratification procedures of even minor updates of these agreements was very cumbersome to manage for the EU side.

Since 2008, the EU Council has thus repeatedly expressed its dissatisfaction with the present state of affairs and recalled "that a precondition for further developing the sectoral approach remains the establishment of a common institutional framework for existing and future agreements through which Switzerland participates in the EU's Single Market, in order to ensure homogeneity and legal certainty for citizens and businesses. The Council stresses the common understanding between the EU and Switzerland about the need to finalize the negotiations on the institutional framework agreement as soon as possible. Its conclusion will allow the EU-Swiss comprehensive partnership to develop to its full potential."²⁹

In practice these EU conditions would mean, that Switzerland must accept not only an institutional framework, that covers all agreements with the EU and provides a mechanism for a smoother updating of them in pace with the developments

²⁷ Cf. The Legal imbalance referred to in Sect. 4 above.

²⁸ See footnote 1.

²⁹ EU Council conclusions on EU relations with the Swiss Confederation, 28 February 2017.

of the EU. In addition, there would have to be additional institutional arrangements for monitoring the correct application of the agreements by Switzerland as well as for judicial interpretation and settlement of disputes.

Suggestions that Switzerland could avail itself of the existing EFTA institutions ESA and the EFTA Court reinforced by a Swiss College Member and a Swiss Judge have so far not been accepted by Switzerland. In the absence of tangible progress on these issues the EU has put further negotiations on new sectoral agreements on hold, which also means that since 2008 an almost finished energy agreement has not been concluded.

6 Conclusion

From the above, a *first conclusion* would concern the specific and unique character of the EU. In its Opinion 1/91 the ECJ recalled that: “The EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based upon the rule of law. The Community treaties established a new legal order for the benefits of which States have limited their sovereign rights, in ever wider fields and the subjects of which comprise not only Member States but also their nationals”.³⁰

Today the EU Internal Market, 25 years after the completion of the Delors’ Commission’s White Paper programme,³¹ has become both comprehensive and complex in a way that is without precedent. The areas of the four freedoms are now so interdependent that, apart from through full EU Membership, participation in the Single Market can only be granted if sufficient legal and institutional guarantees for homogeneity and legal certainty are given. Only the EEA has the necessary institutional mechanisms to allow participation in the EU Internal Market on equal and non-discriminatory grounds. Since the entry into force of the EEA Agreement, almost 25 years ago, the independent EFTA Surveillance Authority and EFTA Court have been crucial for guaranteeing both the EFTA States’ compliance with their obligations under the EEA Agreement, and equal access to justice for individuals and economic operators in the whole EEA.

Out of all the different arrangements so far entered into by the EU it is only the EEA Agreement, which provides access to, and participation in, the EU Internal Market on an equal and non-discriminatory basis. None of the other agreements entered into by the EU with third parties, e.g. those with Canada, South Korea or Ukraine, have the ambition of achieving full participation in the Internal Market. As to the agreements with Switzerland, which together may be those that come closest to the EEA, there are still no guarantees of legal certainty and non-discrimination for citizens and businesses. That is also why the EU has put a break on further

³⁰ Cf. the ECJ in Opinion 1/91, [ECR] 1991, I-6084, paragraph 21.

³¹ It is recalled that this was prepared by UK Commissioner Lord Cockfield.

developments with that country. To overcome this institutions like ESA and the EFTA Court would be needed.

Through the legal strength of EU law and the very strong EU institutions, all EU citizens and economic operators are guaranteed equal treatment and non-discrimination in the Single Market. It would have been natural to expect, that it would be a priority for the UK Government also to seek guarantees for this considerable and invaluable achievement to continue for UK nationals and economic operators even after an exit from the EU. On its insistence on UK sovereignty, independence and “taking back control”, the UK Government has, however, hardly addressed this aspect at all. It would seem instead that it is under the impression, that, as long as previous EU *acquis* is transformed into national UK law, there would be equivalence between EU and UK laws and thus not much to worry about.³² Nor does it seem that the UK Government has paid much attention to what the EU, from a constitutional law point of view, must require before it can accept to negotiate a deep and special partnership with the UK. So far position papers have ignored the extent to which the EU is a union of law with very strict limits as to what it can and cannot agree to without running the risk that any deal concluded is found incompatible with the EU Treaties and thus rejected by the CJEU.³³

The answer to the question of which arrangements may be possible for UK-EU relations after Brexit is simple. There exists only one model which – with its strengths and weaknesses – could provide for full participation in the Single Market: the EEA. As seen by the case of Switzerland, even a more limited ambition as to the scope of participation therein would, however, require substantial institutions and reciprocal guarantees for equal treatment and non-discrimination, without which inter alia the infamous *legal imbalance* would manifest itself. Given the UK’s red lines it is, however, clear that the Canada and South Korea FTAs provide the most advanced models conceivable.

However, to rephrase the famous quote from Bill Clinton’s 1992 presidential campaign, the answer could also be: “*It’s the institutions, stupid!*”

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³² Cf. Rt. Hon. David Davis MP, Secretary of State for Exiting the European Union, in his preface to the White Paper “The United Kingdom’s exit from and new partnership with the European Union”, HM Government, February 2017.

³³ Cf. Opinion 1/91 referred to in note 12 above.

Patience and Perseverance in Administering Justice – The Role of a Judge at the Andean Tribunal of Justice



Luis José Díez Canseco Núñez

1 Introduction

There is nothing more gratifying for a law professional than the administration of justice. It is an honour which comes with great responsibility. Indeed, the parties to a proceeding pin all their hopes on those of us sitting behind the bench. This work is highly challenging and not devoid of doubts depending on the complexity of a case, but also on personal characteristics: for example, knowledge or lack thereof; training or misinformation; beliefs and biases; culture and ideologies. We are human beings not immune to doubts: when we return to our offices after a decision has been handed down, and especially after oral hearings – where parties give their all to share their points of view – we bare a heavy burden and walk slowly and in silence. We are seized with a feeling of indescribable solitude, and perhaps even suffering. We must hand down a decision knowing that the hopes of the parties to a proceeding hinge on our action.

This is common to judges in all jurisdictions, but is particularly relevant and much more complex in the context of disputes brought before international courts. In these cases, our decisions have an impact not only on the parties themselves, but the countries under our jurisdiction, and in many, if not most cases, extending to society at large.

There is also an added layer of complexity: our nationality. Indeed, frequently, Government representatives erroneously assume that our position should be aligned with that of our respective countries. This misperception stems from two factors.

Dean of the Faculty of Law of the Universidad Tecnológica del Perú, and former President of the Andean Tribunal of Justice.

Translated from Spanish by Corinne Rubin.

L. J. Díez Canseco Núñez (✉)

Faculty of Law of the Universidad Tecnológica del Perú, Lima, Peru

Firstly, the composition of the Tribunal, which includes one judge from each Member Country; secondly, the judges often do not necessarily have judicial experience since, despite having legal training, many of the appointments are related to backgrounds as diplomats, senior Government officials, or, in some instances, they are prominent figures with close ties to a Government. This leads to the assumption – again, an incorrect one – that they are a sort of representative of the countries that appointed them.

This is all the more complex in the context of an international court, as is the case of the Andean Tribunal of Justice (“ATJ”), established in May 1979, which is modelled on and has responsibilities that are very similar, if not identical, to that of the European Court of Justice (“ECJ”) and the EFTA Court. One noteworthy similarity to the EFTA Court, for example, is the small number of judges: the EFTA Court consists of judges from Iceland, Liechtenstein and Norway; while the ATJ consists of judges from Bolivia, Colombia, Ecuador and Peru. In fact, the small number of judges, the appointment mechanism and each Andean country’s different level of attachment to the process of integration can lead to the assumption – sometimes unjustifiably – that Andean judges must protect the interests of their country of origin. One case in point is the title that was officially conferred upon me: “Judge for the Republic of Peru”. That is why, in order to stress my independence and set aside my nationality, I always used the title of “Judge of the Andean Tribunal of Justice”.

When I was appointed as judge of the ATJ at the end of 2013, many people asked me why I had accepted. Many said that I should continue teaching competition law and intellectual property at university, while others thought I should continue practising law. Some suggested that it was not worth joining a dying entity, which was part of a process that began in May 1970 with the signing of the Andean Subregional Integration Agreement, or Cartagena Agreement, and which was occasionally yet perpetually in a crisis of legitimacy, particularly since the early 1990s, owing to the different economic models of the countries participating in the Andean integration process. Others still underscored the fact that the ATJ was an entity characterised by being composed of those nearing the height of their career or beyond. It was a sort of “golden retreat”, which, in the light of diplomatic privileges and other aspects related to this position, could ensure a more-than-comfortable retirement. It was also said that the ATJ took too long to hand down rulings – which was true – and that most of these were a cut-and-paste of past decisions. That was particularly true for preliminary rulings relating to intellectual property, which accounts for more than 90% of the Tribunal’s work. That revealed a lack of resourcefulness and commitment to judicial work. Lastly, there were others still who asked me innocently, or perhaps with some degree of irony, what the ATJ was, what it did, and what its purpose was.

Against this backdrop, and given that the Governments of Member Countries would not support nor be interested in adopting legislative reforms to improve the way they operate, I crafted a strategy to try to change the ATJ from within. It was a challenging task which required patience and a great deal of perseverance. In this context, I wish to draw particular attention to President Carl Baudenbacher, with whom there was a happy coincidence of views, expressed during his visit to Quito in May 2015, and shortly thereafter, during my visit to Luxembourg in June of the same year, I greatly appreciated his sharing of his extensive experience and his

generosity. With his characteristic impeccable good manners and energy, President Baudenbacher shared four key recommendations which helped me to continue my work with greater assurance. First, to seek out every possible space for outreach on the Andean legal system. Second, to improve the quality of the rulings. Third, to ensure that the ATJ is recognised for its transparency. Fourth, to advocate for more responsibilities for the ATJ. Our shared perspectives, and his recommendations come in no particular order of priority. Rather they are a shared vision of those who, as judges, want to do things well.

2 Disseminating the Andean Legal System

Without a doubt, the chief responsibility of any court of justice is the administration of justice through its rulings. Nevertheless, in the case of the ATJ, and especially of its President, there is an additional obligation: to promote the dissemination of, and to perfect community law. This is explicitly set out under Article 45 of the Treaty Creating the Court of Justice of the Cartagena Agreement, which was amended by the Protocol of Cochabamba 1996, as well as Article 7, paragraph 18, of its Rules of Procedure.

As mentioned above, when I was appointed as judge, many people asked me where I would be working and what the purpose of the ATJ was. This lack of knowledge about the Tribunal sounded an alarm and shed light on the clear need to address this situation. Indeed, dissemination of information on the Andean legal system is crucial to its consolidation, and also contributes to the integration process.

This general lack of awareness about community law, especially among Government entities, civil society, universities, the business community and even the legal community, needed to be corrected. In short, the ATJ needed to have a greater presence in academic and professional forums both nationally and internationally. A study of outreach activities conducted by my predecessors revealed that such efforts were sporadic at best, and left to just a few judges' goodwill.

The reasons for this were twofold. First, many judges lacked awareness about Andean community law, since appointments were made on the basis of politics or favours rather than expertise or merit. Second, advocacy hinged on the individual efforts of a few judges, reflecting the fact that this position was a sort of "golden retreat". Regrettably, neither situation contributed to the task of awareness-raising. Little to nothing could be done to address the appointment of judges, for example, since the legal framework does not set out any special qualifications for the appointment of judges. Moreover, awareness-raising needed to become a matter of institutional policy rather than one of individual effort. In this respect, I had the unconditional support of one of the judges, who had been appointed at the same time as me and was imbued with the same spirit.

That marked the beginning of intensive judicial efforts to raise the profile of and awareness about the activities of the ATJ. Outreach activities were conducted with universities, academic centres, and particularly, professional associations. In fact,

during my presidency, I took part in approximately 50 events providing an overview about the evolution of the jurisprudence on various matters relating to Andean community law, and also raising awareness about Andean regulations.

As regards the judiciary, countless visits were made to judges in all the Member Countries. The idea was to turn the usual formal courtesy meetings conducted to date into working meetings, in which the nature of community law was explained, with a particular focus on the mechanism for liaising and consultations. As noted, the majority (more than 90%) of cases before the ATJ are requests for preliminary rulings. These facilitate what is known as a judicial dialogue in which national judges address the ATJ over the meaning and scope of the community legal framework that will serve as input in resolving a national dispute. The underlying objective is uniformity of interpretation.

In the working meetings, it became evident that many national judges lacked awareness not only about the Andean legal system, but also about the obligation to refer cases to the ATJ. It also became evident that, since this is not set out clearly in the Andean dispute settlement system, national judges limited themselves to consultation in order to meet the obligation. They merely requested an interpretation of Andean law in the abstract and out of context from the specific case to be settled. In addition, in the context of meetings with national judges, it came to light that the rulings were too generic to serve as guidance in implementing the decision in a given case. Consequently, substantial training process was initiated so that issues or questions submitted by national judges could be made as specific as possible in order to ensure that preliminary rulings could be made equally clear.

Another major outreach and advocacy effort was conducted with Member Countries' intellectual property authorities. In this regard, it should be noted that the overwhelming majority of preliminary rulings deal with intellectual property cases. In the past, these IP authorities limited themselves to implementing these rulings, however this had never been checked in direct working meetings. Accordingly, in order to break down these silos and raise awareness of the ATJ's work, attempts were made to understand whether the preliminary rulings were useful to the authorities and what issues they identified therein. The IP authorities' response was clear and similar to that of the national judges: these judgments were too generic to help guide the implementation of regulations, in addition to being merely a cut-and-paste of past rulings.

The overall situation with national authorities and judges was discouraging. Consequently, the ATJ changed the format of preliminary rulings to make these more specific and limited to points of interest. In addition, a substantial training initiative was launched in order to ensure that the issues and questions submitted by judges and authorities to the ATJ could be made as specific as possible.

As regards preliminary rulings, it should be noted that efforts were also made to involve national authorities dealing with other fields of community law, such as customs, telecommunications and health matters – all of which are covered by Andean regulations to differing extents. Nevertheless, surprisingly, these authorities were unaware of the Andean regulations.

The outreach efforts generated immediate results. The judicial activity of the ATJ increased exponentially since 2014, especially in relation to requests for preliminary rulings. For example, in the period from 2008 to 2013, an average of 172 requests for preliminary rulings were received annually. In 2014, this number nearly doubled to 325 requests. This trend continued in 2015, when a record 691 requests were submitted by judicial bodies, administrative entities and arbitral tribunals of the four Member Countries. As can be noted, between 2014 and 2015, the number of requests for preliminary rulings referred to the ATJ quadrupled as compared to the annual average of cases received and settled from 2008 to 2013. The caseload has been steadily increasing, reflecting the effect of the dissemination of information on the legal system.

3 Improving the Quality of Rulings

As mentioned above, in our meetings with the national judges and authorities responsible for implementing community regulations, it was noted that ATJ rulings were too generic and vague to help guide the implementation of regulations and could even be used by the parties in a diametrically opposed way. In other words, the parties to the domestic proceedings presented conflicting arguments using the same preliminary ruling. This was the consequence *inter alia* of the rulings being overly extensive in many cases. This bleak situation led the ATJ to decide to change the format of the preliminary rulings and judgments in order to make them more precise and limit them to points of interest or to points directly linked to the dispute.

Hence, firstly, and specifically in relation to the preliminary rulings, intensive training efforts were conducted so that issues or questions submitted by national judges could be made as specific as possible. Secondly, on the basis of specific questions, the judgments were made as direct as possible and specific to the matter referred to the court.

In addition, the format of the Court's rulings was restructured in order to clearly set out which regulations were to be interpreted, in line with past practice, but also what issues were in dispute. This format was used in preliminary rulings, but also in non-compliance and nullification cases. This has allowed the conclusions and operative part of the rulings to be better seated, and it is hoped that this will be useful to judges.

Another significant way to improve the quality of rulings can be ensured through oral hearings. Indeed, Andean regulations expressly refer to the possibility of oral hearings in the framework of nullification, non-compliance and omission procedures. Nevertheless, this option is not expressly set out with respect to preliminary rulings, although it is not prohibited either.

One suggestion for reform of the ATJ, that I repeatedly proposed, was to follow the European model in opening an oral hearing in the preliminary rulings. The aim is to enable the parties to the proceedings, the national judges, international bodies

with experience in specific areas, as well as interested third parties such as non-governmental organisations or interest groups, to express their views, including as *amicus curiae*, in given cases. Depending on the complexity, repercussions or novelty of these cases, Andean judges would thus hear a number of opinions as to how Andean norms could be interpreted. This would help to improve the quality of rulings since it would help to collect accumulated experience first-hand, but also help parties – who are ultimately the ones directly affected by the preliminary rulings – to share their views. This enriches the debate, enhancing the quality of rulings.

Recently, pursuant to Accord 08/2017 of 24 November 2017, Regulations were adopted specifying various aspects on the nature of preliminary rulings, the applicable methods of interpretation, how and when to request such rulings, and on anticipating possible questions from the parties. This has led to a very successful practice which has yielded significant improvements in terms of both the number and precision of preliminary rulings.

In particular, Article 9 of these Regulations, referring to written or oral reports of a technical or regulatory nature, opened the door to convening oral hearings in preliminary rulings, on an exceptional basis. This is a major breakthrough which should be commended. Although Accord 08/2017 failed to include the opportunity for parties to the proceedings – those who will be directly affected by the decision – to directly express their views and be examined by the judges, this was corrected through Accord 04/2018 of 11 May 2018. In addition, on 26 June 2018, the first oral hearing was held in the context of a preliminary ruling. This legal proceeding was a landmark in procedural law of the Andean Community.

4 Transparency

One of the reasons for the lack of regard for the ATJ is Andean judges' distance, in a number of senses, from judicial, governmental and professional areas of the Andean countries. This was alleviated through an intensive programme of technical meetings and outreach activities launched in 2014. As mentioned above, this advocacy effort bore fruit in terms of the caseload received.

However, this is not merely about holding meetings and conducting training. Rather it is about understanding the work of judges in specific cases. In this respect, and following the unanimous practice of the judiciary of Andean countries, it was very important to dispel the impression that decisions were adopted unanimously. In this respect, it was important to identify whether there had been dissenting opinions.

As a first step towards access to dissenting opinions, it should be noted that, in addition to changes to the format of rulings, such as specifying the matters at dispute and structuring the ruling on the basis of those matters, it was agreed that it was important to identify which judge had been responsible for drafting a given judgment. Lastly, it was agreed to list the judges who had voted in favour, and, if applicable, indicate which judge had expressed a dissenting opinion.

These changes in format are of significant importance since they helped to clearly identify the legal issues that needed to be resolved. In the past, there were rulings that were very many pages long which failed to address the matter in dispute. The obligation to indicate the judge rapporteur has inserted a degree of healthy competition to draft increasingly better-reasoned judgments. This also indirectly led to a reduction in the time taken for adjudication since the legal community was able to identify which judge handed down the most rulings. Lastly, identifying who had voted, insofar as this was possible, helped to understand each signatory judge's line of thinking, which is important.

Identifying which judges had been in favour or against a ruling has great implications. In the past, when it was not made explicit that there had been a majority, a false impression was given that all ATJ rulings had been adopted unanimously. That was very far from the truth. This new format has had two major effects. Firstly, it enables the identification the issues on which the judges were in full agreement, which generates legal certainty. Secondly, it was possible to determine whether there were discrepancies between the positions expressed, and who expressed those positions. This enables the legal community to know whether, respectively, there may be more traditional or advanced positions. This helps to further the law.

It should be noted that although differing views were brought to light, the rules of the Tribunal did not permit the publication of separate opinions together with the judgment. At the time, I strongly advocated for and proposed the adoption of a mechanism to identify dissenting opinions, but I did not accomplish this during my tenure. However, recently, by means of Accord 09/2017 of 29 November 2017, published in the Official Gazette of the Andean Community, an Informative Note ("*Nota Informativa*") was issued which states that, once a final decision has been issued, parties to the procedure or any other interested person may request access to the dissenting opinions. This is a major breakthrough with respect to transparency of the ATJ's activities and which will enable greater scrutiny of the rulings.

5 Greater Accountability

A major undertaking that the ATJ has furthered has been that of working together to improve and refine the Andean legal order. The Judges cannot limit themselves to settling disputes and applying the law in specific cases. Our task in resolving cases enables us to identify regulatory gaps first-hand, especially if, at the level of Member Country Governments and the General Secretariat of the Andean Community, there is a regrettable paralysis in the legislative work. I am convinced that we are able to help improve the regulatory framework, as was the case with the "Proposals of the Justice Tribunal of the Andean Community for a positive regulatory agenda for integration", adopted by the Plenary of the ATJ on 8 July 2014, and which has been widely disseminated since then.

The Positive Agenda of the ATJ proposes the adoption of various decisions on matters favouring the integration process in general, particularly those aimed at

bringing about an enduring improvement in the standard of living of the Subregion's population, as set out under Article 1 of the Andean Subregional Integration Agreement.

The legal order of the Andean Community and rulings of the ATJ make up the common heritage that has been built over the past 45 years in the Subregion. This is a duly structured, ordered and institutionalised normative system that has evolved and been consolidated not only through positive law, but particularly through jurisprudence. Over the past 30 years that it has exercised its competences, the ATJ has had the opportunity to directly assess the impact of Andean norms in the territories of the Member Countries, as well as the existence of omissions or gaps that negatively affect the application of community norms. In this respect, although the ATJ does not have the power of "legislative initiative", it must be considered as a collegiate Body with sufficient experience and expertise to identify legislative needs and to propose real, timely and effective solutions, thus contributing to the development of the regulatory function within the ambit of the community. In addition, its judges can be considered to be a kind of skilled citizens whose views are not linked to any interest except that of improving Andean citizens' standard of living.

Along these lines, the adoption of regulations relating to the following areas was proposed: consumer protection, country brand or sign, harmonisation of procedures for registration of designations of origin and indications of source, and the refinement of both facets of rules on competition: unfair competition and the protection of free competition.

Firstly, with regard to consumer protection, the inhabitants of the Andean subregion are, of course, consumers who acquire goods or services daily. In order to enter into the countless number of transactions consumers must be well-informed, mainly to ensure an adequate allocation of resources, but also to build confidence in cross-border transactions. Indeed, provisions referring to the protection of the consumer may be found in the constitutions of every Andean Country, to the extent that this is considered to be a fundamental right. In the same way, there are also consumer protection laws which seek to ensure that adequate and timely information is provided on goods and services. There are also provisions *inter alia* on weights and measures, the marking and labelling of goods, technical standards on quality and expiration dates. Nevertheless, the relevant regulations vary in coverage and scope. This can impede trade as they are capable of creating non-tariff barriers that distort trade, strengthen monopolies and foster dominant market positions.

The European Union has been conscious of the importance of consumer protection as a mechanism for promoting integration. That is why, since the early 1970s, it began to establish a substantial body of regulations that aims to protect health, safety and economic well-being covering such fields as: the protection of the rights to information and education; incentives for the creation of associations; protection against serious hazards or risks that cannot be tackled as individuals; training to ensure selection on the basis of clear, precise and coherent information; the possibility to provide access to swift and effective dispute resolution with traders; adaptation to economic and social changes, placing particular emphasis on the food, energy, financial services, transport, and technology markets.

This normative landscape is based on the premise that consumer protection is a fundamental economic right of community citizens which facilitates cross-border transactions; it has also helped to bolster regional trade and position their goods on the international markets.

That is why, recognising integration as a means not only to enhance economic relations between States and businesses, but also to foster the active participation of consumers, the ATJ felt it was appropriate to study consumer matters, and, as appropriate, adopt various Decisions on specific issues.

Secondly, as regards protection of the Country Sign, also known as the Country Mark, it was noted that this constitutes a distinctive *sui generis* sign which aims to promote the identity and image of a country, in addition to fostering competitiveness, and promoting investment and tourism. Nevertheless, national or international legislation does not provide for specific recognition or protection to country signs. That is why sign recognition was proposed at the regional level through the adoption of an Andean Decision; in addition to recognising a special distinctive sign, this Decision seeks to establish protection mechanisms in order to prevent improper registration or use.

Thirdly, as regards intellectual property, the adoption of procedures for the registration of designation of origin, indications of source and seals of approval was proposed. Indeed, Decision 486 includes a general system for designations of origin and indications of source. Nevertheless, a complementary decision should be adopted in order to further develop that system. EU legislation could be used as a model to that end.

A fourth proposal relates to competition law in terms of both the prevention of unfair competition and the protection of free competition, respectively. In terms of the prevention of unfair competition, commercial advertising had reached across Andean Countries' borders as a result of the Liberalisation Programme which has helped consumers to access goods originating from countries across the community. This also applies to services. For various reasons, businesses develop identical advertising campaigns that are disseminated throughout Community territory. In addition, cable and satellite television and the widespread use of the Internet have provided Andean consumers with access to advertising campaigns from any Member Country. Articles 258 to 269 of Decision 486 of the Commission of the Andean Community, "the Common Industrial Property Regime", contain provisions relating to the prevention of unfair competition, including provisions regulating in part commercial advertising. It should be noted that these provisions limit the scope of application to elements "relating to industrial property". In practice, this implies a restricted application of this important legal discipline since the legal framework is only applicable when a situation relates to elements of industrial property (acts which create confusion) and anti-competitive behaviours that do not necessarily include such aspects as a distinctive sign, an invention or a designation of origin.

In practice, the prevention of unfair competition has been governed by national regulations which may be very similar in countries which have these sorts of regulations. In practice, however, uniform application is not verified since such disputes do not reach the ATJ for preliminary rulings. Consequently, it is highly desirable,

following the example of the EU, to establish a common system on unfair competition which extends beyond the scope of Decision 486.

In terms of free competition, under Decision 608 of the Commission of the Andean Community, "Regulations for the protection and promotion of free competition in the Andean Community", a body of norms was established which seeks to protect the community market from anti-competitive practices that distort competition. These regulations are essential for the integration process since it is of little use for Member Countries to negotiate and adopt commitments in the framework of the Liberalisation Programme if, meanwhile, businesses decide to adopt or undertake restrictive practices through agreements *inter alia* on the reduction of production quotas, market segmentation, and discriminatory practices.

These practices, following the EU model, have been the object of legislative interest in the Andean Community. Indeed, there are provisions prohibiting agreements that limit competition as well as practices that constitute abuse of a dominant position. These regulations are a major step forward towards preventing and sanctioning anti-competitive behaviours and practices within the Andean market. In addition, three Andean countries have specific legislation to exclude these sorts of practices. Nevertheless, Decision 608 has been applied on very few occasions, and contains major structural and procedural flaws. It is also lacks modern mechanisms for identifying such practices, such as leniency programmes. In short, these regulations lack sufficient elements to ensure its effective application.

In addition, unlike in EU law, Andean law lacks a mechanism for the control of mergers and acquisitions that would contribute to prevent such concentration. Also, the best way to prevent actions relating to anti-competitive agreements and abusive practices is to ascertain the means of the acquisition, or the control of competitors' shareholders located in other countries of the community.

In this respect, the Positive Agenda aims to promote a review of Decision 608, with a view to modernising it and simplifying how it is applied, as well as to include provisions relating to merger control.

Being an international judge is a wonderful life experience during which, with determination and goodwill, one can help to support a process which benefits citizens. It is not, as mentioned above, about limiting oneself to handing down rulings, but must be about trying to advance the improvement of legislation. That is what we have tried to do with the so-called Positive Agenda.

6 Final Thoughts

I wish to express my appreciation and gratitude to President Baudenbacher for the advice he gave me. His straightforward and impartial guidance let me know that I was on the right path. It was certainly with patience and perseverance that I implemented his recommendations and, consequently, I can do no more than to thank him, and to emphasise that he will hold a special place in the Andean integration process.

Adjudication in Maritime Disputes



Vladimir Golitsyn

The present essay addresses certain challenges facing international judicial institutions, as well as emerging issues in international adjudication under the 1982 United Nations Convention on the Law of the Sea (“the Convention”).

The Convention has established an innovative and comprehensive dispute settlement system that provides for a broad application of the concept of compulsory settlement of disputes while leaving to States Parties the freedom to choose their preferred settlement mechanisms.

As a consequence, States Parties must accept that, in principle, all disputes concerning the application or interpretation of the Convention can be submitted – unilaterally, that means by one of the parties to the dispute – to an international judicial or arbitral body. This can be either the International Tribunal for the Law of the Sea (“the Tribunal”), the International Court of Justice (“the Court”) or an arbitral tribunal constituted in accordance with the relevant provisions of the Convention.

The Convention provides for a number of limitations, and optional exceptions to compulsory jurisdiction but these do not question the principle as such. Also, the unilateral submission of disputes to judicial or arbitral bodies is not the only possibility contemplated by the Convention; States Parties can also submit such dispute through mutual agreements, so-called Special Agreements.

Nevertheless, it is worth recalling that all contentious cases that have been brought before international courts and tribunals under the Convention’s dispute settlement system since its entry into force were either made, or at least initiated, in the framework of compulsory dispute settlement. It is true, that in several of the contentious cases brought before the Tribunal, its jurisdiction was based on a special agreement between the parties. All of those cases, however, had been transferred to

Former President of the International Tribunal for the Law of the Sea.

V. Golitsyn (✉)
New Canaan, CT, USA

the Tribunal after one of the parties had submitted them unilaterally to arbitration. Thus, those cases have their origins also in compulsory dispute settlement.

One of the issues arising in international adjudication in maritime disputes under the Convention is the choice of dispute settlement *fora* to which States Parties to the Convention can refer their disputes.

As noted above, the Convention offers a choice between different dispute settlement mechanisms. In recent years, in parallel to the general increase of cases being submitted to courts and tribunals, it also become discernible that the Convention's system, in practice, operates in favour of arbitration as the means of dispute settlement. This is largely due to the fact that, pursuant to Article 287 of the Convention, arbitration is what is called the "default procedure" to which disputes are to be referred to when the parties cannot agree on any other forum. In fact, in accordance with Article 287 of the Convention, arbitration is mandatory when the dispute is not covered by declarations made by the parties to the dispute or when the parties, in their declarations, have not accepted the same procedure.

The set-up chosen by Article 287 is of course an integral part of the Convention's dispute settlement system and was the outcome of a compromise between diverging interests of States – a compromise that could only be achieved with difficulty and after complicated negotiations at the Third United Nations Conference on the Law of the Sea. My intention is not at all to question this compromise. While it may be questioned whether this compromise constitutes the best solution, one should acknowledge that it reflects the will of States Parties to the Convention.

Standing international judicial bodies, such as the Tribunal, can, of course, make clear that they have attractive alternatives they can offer to States. In this respect, attention may be drawn to the possibility of States to refer cases not only to the full Tribunal, i.e. its plenary of 21 Judges, but also to different chambers of a smaller composition.

The general rule (or the preferred option) under the Statute of the Tribunal is that disputes are to be considered by the Tribunal in plenary.¹ This rule, which is largely reflected in the Tribunal's practice, ensures the implementation of the principles of equality of the world's principal legal systems and equitable geographical distribution.² This is, of course, without prejudice to cases concerning the exploration and exploitation of the Area,³ which are subject to the exclusive jurisdiction of the Seabed Disputes Chamber of the Tribunal.

The practice of the Tribunal indicates that there is not much support from the parties to the "standing" special chambers established by the Tribunal to deal with particular categories of disputes.⁴ Neither is there much attraction to using the Chamber of Summary Procedure.⁵ In two cases where the applicant proposed to submit the dispute to this chamber, the respondent rejected that proposal.

¹ The Statute of the Tribunal, Article 24, paragraph 1.

² *Ibid.*, Article 2, paragraph 2.

³ Under Article 1, paragraph 1, of the Convention the "Area" is defined as "the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction".

⁴ The Statute of the Tribunal, Article 15, paragraph 2.

⁵ *Ibid.*, Article 15, paragraph 3.

Another option, namely having a case heard before a special *ad hoc* chamber of the Tribunal, has however found some interest among States Parties. Such special chambers are usually composed of five Judges and are established for a particular case upon the request of the parties. The first time that this option was chosen before the Tribunal was in the *Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Union)* in 2000.⁶ This case was later removed from the Tribunal's docket after the parties had reached a settlement. More recently, in 2014, the parties in the *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)* also agreed to submit their case to such a special chamber.⁷

It is noteworthy that, in both cases, one of the parties had originally instituted arbitral proceedings under Annex VII of the Convention. During consultations with the President of the Tribunal that were, in fact, held with respect to the appointment of arbitrators, the parties agreed to transfer the cases to a special chamber of the Tribunal.

The mechanism of a special *ad hoc* chamber may be described as a "hybrid" between judicial settlement and arbitration. On the one hand, parties can benefit from the advantages offered by a functioning institution, and have their case heard by an experienced panel of the Tribunal's judges, in accordance with pre-established rules of procedure, and without incurring any procedural costs. On the other hand, parties retain a degree of flexibility in choosing the members of the panel, in particular, since in the case of the Tribunal the composition of an *ad hoc* chamber is to be determined by the Tribunal "with the approval of the parties".⁸ Parties may also propose modifications or additions to the Tribunal's rules of procedure.⁹

The use of this mechanism may, however, present some down sides when the formation of a special *ad hoc* chamber is proposed by a party as an alternative to arbitral proceedings instituted under Annex VII to the Convention. In these circumstances, particularly when arbitral proceedings have been instituted, an agreement on the composition of an *ad hoc* chamber to which the dispute would be transferred may be difficult to attain, notwithstanding the fact that in two cases before the Tribunal this has actually happened. For example, one of the parties could maintain that, if there would be no composition of the chamber meeting its wishes, its preferred option would be arbitration.

⁶International Tribunal for the Law of the Sea, Case No. 7 *Conservation and Sustainable Exploitation of Swordfish Stocks (Chile/European Union)*, Order, 16 December 2009, ITLOS Reports 2008–2010, p. 13; www.itlos.org.

⁷International Tribunal for the Law of the Sea, Case No. 23 *Delimitation of the maritime boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, Provisional Measures, Order, 25 April 2015, ITLOS Reports 2015, p. 146; www.itlos.org.

⁸The Statute of the Tribunal, Article 15, paragraph 2.

⁹The Rules of the Tribunal, Article 48. Proposals may concern any provisions included in Part III of the Rules of the Tribunal.

An additional factor to be kept in mind is the fact that, while it is true that a decision of a special *ad hoc* chamber is considered as rendered by the Tribunal,¹⁰ its composition does not ensure the representation of principal legal systems and equitable geographical representation.

When States agree to submit a case to an international court or tribunal, and even more so when a case is brought unilaterally by a State against another in the framework of compulsory jurisdiction, States do – and can – expect that the case is dealt with by the respective court or tribunal in a fair, thorough and efficient manner.

In this respect, the way in which written and oral proceedings are conducted is of particular relevance.

Written proceedings before the Tribunal, as well as those before other international judicial bodies, tend to take considerable time and to produce voluminous pleadings and annexes resulting in massive case files. In the case of the Tribunal usually two rounds of written pleadings are held with each party submitting one pleading per round. Under its Rules, the Tribunal retains the power to decide whether a second round of pleadings is necessary.¹¹ However, according to the Tribunal's practice, such a second round has regularly been authorized, taking into account the agreement reached by the parties during their consultations with the President of the Tribunal.

The second round has the advantage of providing an opportunity to parties to respond to the arguments of their counter-part. Parties regularly request a second round and consider it important to provide the Tribunal with the full picture of their arguments. A restrictive approach concerning the authorization of a second round of written pleadings does therefore not appear to be useful.

As regards the volume of written pleadings, in particular of the annexes, it should be acknowledged that although pursuant to Article 63 of the Rules of the Tribunal, parties do not need to annex documents which have been published and are readily available, parties prefer, in spite of this rule, to do so, and the documentation therefore remains, in many cases, voluminous.

With reference to the conduct of oral proceedings, one can speak of a new trend in international adjudication consisting of increased interaction between the bench and the bar, in particular by judges addressing questions to the parties in advance of the hearing. This active engagement by judges with the parties and their arguments during the proceedings serves to increase procedural efficiency. It gives parties the opportunity to clarify issues and problems that judges have established during their examination of the case on the basis of the written pleadings.

With an increasing number of cases being submitted, under the Convention, to international courts and tribunals, it is no surprise that procedural means that the defendant party may use in its defence, such as counter-claims and preliminary objections, come more into focus. For a court or tribunal, these procedural means require particular attention to maintaining procedural fairness and safeguarding the equality of arms among the parties.

¹⁰ The Statute of the Tribunal, Article 15, paragraph 5.

¹¹ The Rules of the Tribunal, Article 60, paragraph 2, and Article 61, paragraph 3.

As the issue of counter-claims is concerned, the pertinent provision in the Tribunal's Rules, namely Article 98, unlike the revised Article 80, paragraph 2, of the Rules of the International Court of Justice, does not contain a clause according to which "[t]he right of the other party to present its views in writing on the counter-claim, in an additional pleading, shall be preserved." However, when faced with the presentation of a counter-claim in the *M/V "Virginia G"* case, the Tribunal, nevertheless, preserved the right of the other party to submit an additional pleading "relating solely to the counter-claim" even without an explicit provision to this effect in its Rules.¹² The Tribunal held in this respect that the other party should be given such opportunity "in order to ensure equality between the Parties."¹³

With regard to preliminary objections raised by a party against the jurisdiction of the Tribunal or the admissibility of a case, it is also interesting to make a comparison of the applicable rules of the Court and of the Tribunal. The consequences of such objections being raised are, in principle, the same before both judicial bodies: the proceedings on the merits are suspended and separate proceedings take place relating only to the objections. However, there are also noteworthy differences in the pertinent procedural law of both bodies, in particular with regard to the written proceedings.

Under the Rules of the Tribunal, once a party raises preliminary objections, each party will be given the right to present written observations and submissions with regard to those objections. First, the "other party", that means the party that did not make the objections, may file its statement. After that, the party that had submitted the objections will also be given the opportunity to submit a statement in reply.¹⁴ This party has therefore the possibility to present two statements relating to the preliminary objections, one when it raises them and one in reply to the other party's statement. The other party, however, is restricted to only one statement.

This appears to be a striking difference at first sight, in particular when taking into account that, in the case of the Court, after objections have been filed by a party, it is only "the other party [that] may present a written statement."¹⁵

The explanation for this difference lies in the different approach of the two judicial bodies as to the time at which preliminary objections must be raised. In a case before the Court, it is, as in most cases, the Respondent that wishes to make preliminary objections; this party must file them, at the latest, "three months after the delivery of the Memorial" by the Applicant.¹⁶ Objections from "a party other than the respondent" must be filed "within the time-limit fixed for the delivery of this party's first pleading."¹⁷

¹²International Tribunal for the Law of the Sea, Case No. 19 *M/V Virginia G (Panama/Guinea-Bissau)*, Order of 2 November 2012, ITLOS Reports 2012, p. 309, at p. 316, paragraph 42 (C); www.itlos.org.

¹³*Ibid.*, at p. 315, para. 41.

¹⁴Rules of the Tribunal, Article 97.

¹⁵Rules of the Court, Article 97, paragraph 5.

¹⁶*Ibid.*, paragraph 1.

¹⁷*Ibid.*, paragraph 1.

Under the Rules of the Tribunal, however, preliminary objections must be filed at an earlier stage of the proceedings, namely “within 90 days from the institution of proceedings.”¹⁸ This early date was chosen for the sake of efficient proceedings so that issues questioning the Tribunal’s jurisdiction or the admissibility of a case can be dealt with as soon as possible.

The early date, however, also has the consequence that a Respondent filing preliminary objections before the Tribunal, unlike before the Court, does not have the benefit of the Applicant’s Memorial already being available. It must therefore file its preliminary objections before knowing all the arguments concerning jurisdiction and admissibility that the Applicant would normally make in the Memorial. As a consequence, the Tribunal’s rules grant the party raising preliminary objections the possibility to reply to the other party’s statement in the interest of procedural fairness and equality of arms.

It is interesting to note that, in a recent case before the Tribunal, namely in the *M/V “Norstar” case (Panama v. Italy)* the Respondent had raised preliminary objections. The Applicant contended in that case that the Respondent had brought forward new objections in its statement in reply. Therefore, the Applicant requested the Tribunal to set a deadline for it to reply in writing to these allegedly new objections.¹⁹ The Tribunal, however, found that no new objections had been made.²⁰ It also decided to allocate each party additional speaking time during the oral proceedings to comment on that matter and, on this basis, concluded that “the principle of equality of arms was complied with.”²¹

The use of judicial (or for that matter: arbitral) bodies to peacefully settle inter-State disputes arising out of the Convention is without doubt an important contribution to achieving one of the Convention’s key objectives, expressed in its preamble, namely the establishment of “a legal order for the seas and the oceans.”²²

The work of international judicial institutions in settling maritime disputes and contributing to the development of international law can also be understood in the context of the contemporary concept of global ocean governance. Although it is difficult to identify a single definition of global ocean governance, the concept can generally be understood as a process encompassing all relevant policy and action in respect of the world’s oceans, including the management and use of ocean resources.

Judicial institutions constitute an integral element of this governance process by providing authoritative guidance on what the law of the sea is, and by fostering the progressive development of international law. This is particularly true in the case of the Tribunal, as a consequence of the special responsibilities assigned to it under the Convention.

¹⁸ Rules of the Tribunal, Article 97, paragraph 1.

¹⁹ Judgment of the Tribunal, 4 November 2016, the *M/V “Norstar” case (Panama v. Italy)*, Preliminary Objections, paragraph 50.

²⁰ *Ibid.*, paragraph 52.

²¹ *Ibid.*, paragraph 53.

²² The United Nations Convention on the Law of the Sea, Preamble, paragraph 4.

In this context, it is crucial, that international courts and tribunals continue to offer to States an efficient and fair administration of justice that facilitates the peaceful and sustainable resolution of conflicts. At the same time, those courts and tribunals, in particular when exercising compulsory jurisdiction, need to respect at all times the sovereignty of those States. It is worth recalling, in this regard, that the Convention, when it refers to the idea of a legal order for the seas and the oceans, makes clear at the same time that such order needs to be established “with due regard for the sovereignty of all States.”²³

As international judicial institutions, including the Tribunal, strive to fulfil their functions and bring about the peaceful settlement of maritime disputes, they face certain challenges. Some of these challenges, which are somewhat troubling, originate both in the behaviours of States and from within the institutions themselves.

There is the issue that States use international judicial proceedings for political purposes. There have been examples where States had recourse to international dispute settlement mechanisms where the aim appeared less related to the immediate settlement of a dispute by means of judicial decision. In such cases, an eventual judicial award is viewed as one tool amongst others, to be used in order to eventually achieve a favourable outcome through other means. The submission of such types of cases runs counter to the purpose for which the system of compulsory dispute settlement was established and undoubtedly has an impact on the structure of that system. It is important to recognise that such cases can place international courts and tribunals in a difficult position. The function of international judicial bodies is to assist the parties in the peaceful settlement of their disputes, not to aggravate disputes.

International courts and tribunals cannot ignore the diplomatic consequences of their decisions, but, at the same time, they cannot decline to exercise their jurisdiction, when such jurisdiction has been validly established. Faced with politically motivated requests, it is incumbent upon international judicial institutions to exercise self-restraint and to restrict themselves to passing judgment on a dispute only to the extent that the Convention and the States entrust them with jurisdiction. This does not mean that judicial bodies can sidestep their duty to pass comprehensive judgment on cases validly submitted to them. However, the need for judicial self-restraint where appropriate needs to be highlighted.

From the perspective of the institutions themselves, there is also a risk that international judicial institutions may at times lose sight of their role as mechanisms to facilitate the settlement of disputes. It goes without saying that judicial institutions must be guided by the rule of law and apply the law to the facts presented to them. However, they must always be mindful of their purpose as dispute settlement bodies. The drafting of a judgment or award is not an academic exercise, and the interpretation and application of the law does not take place in a vacuum. Developing the law in a certain direction will be of no use to the parties if it does not help them to settle their dispute. In order to ensure that States Parties maintain their confidence in the institutions created under the Convention, and their willingness to accept the

²³ *Ibid.*, Preamble, paragraph 4.

innovative idea of compulsory dispute settlement, courts and tribunals need to continue their commitment to a fair and efficient administration of justice.

At the same time, courts and tribunals are well advised to examine closely the limits of their jurisdiction with respect to a case before them and to exercise, where necessary, an appropriate degree of judicial self-restraint while, of course, honouring their duty to pass comprehensive judgment on cases submitted to them.

There is also a challenge posed by the existence of multiple international judicial institutions, and, in particular the issue of the competence of the Court to hear disputes arising under the Convention on the basis of the parties' acceptance of the jurisdiction of the Court pursuant to Article 36, paragraph 2, of its Statute, rather than on the basis of a choice of procedure under Article 287 of the Convention. In its decision of February 2017 on preliminary objections in the *Somalia v. Kenya* maritime boundary dispute, the Court was faced with the question of whether the parties' Article 36, paragraph 2, optional clause declarations formed an agreement to appear before the Court so as to exclude recourse to the dispute settlement system under the Convention, in accordance with its Article 282.

In its declaration accepting the compulsory jurisdiction of the Court, made pursuant to Article 36, paragraph 2, of the Court's Statute, Kenya excluded from the scope of its acceptance "[d]isputes in regard to which the parties to the dispute have agreed or shall agree to have recourse to some other method or methods of settlement."²⁴ Kenya submitted that as both parties had accepted the compulsory settlement of disputes under the Convention, the proper forum for the settlement of the dispute was an arbitral tribunal constituted in accordance with Annex VII of the Convention.²⁵

The Court held that Article 282 of the Convention should be interpreted so that an agreement to submit to the Court's jurisdiction through optional clause declarations falls within the scope of that article and applies "*in lieu*" of procedures provided for in Section 2 of Part XV of the Convention, even when such declarations contain a reservation to the same effect as that of Kenya.²⁶ As a result, the Court held that it has jurisdiction to hear the dispute.²⁷ In exercising its jurisdiction on the basis of Article 36, paragraph 2, of its Statute, the Court has interpreted the provisions of Part XV of the Convention with potentially wide-reaching implications.

The legislative history of the Convention provides no guidance as to what the intentions of the States Parties to the Convention were regarding the interaction between declarations under Article 36 of the Court Statute and Article 282 of the Convention. Nor has the issue been addressed more recently at the Meeting of States Parties to the Convention. Consequently, it may be assumed that the door is still open for an interpretation of this relationship different from that suggested by the Court.

The General Assembly of the United Nations by resolution A/RES/249 of 24 December 2017 decided to convene an intergovernmental conference "to elaborate

²⁴ International Court of Justice, Judgment of 2 February 2017, *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya) Preliminary Objections*, paragraph 31.

²⁵ *Ibid.*, paragraph 33.

²⁶ *Ibid.*, paragraph 130.

²⁷ *Ibid.*, paragraphs 132 and 133.

the text of an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.”²⁸ Among the many questions to be discussed at the conference will be the question of a mechanism for the settlement of disputes concerning the interpretation or application of the instrument.²⁹ The diplomatic conference may provide an opportunity for States to clarify what the relationship between declarations made under Article 36 of the Court Statute and Article 282 of the Convention should be.

In concluding, it should be reiterated that the dispute settlement system of the Convention is a success story so far. This demonstrates that international courts and tribunals entrusted under the Convention with adjudicating disputes concerning the application and interpretation of the Convention are discharging their tasks with a high degree of professionalism and responsibility.

The role of international judicial institutions in the maintenance of international peace and stability should not be underestimated. However, as described above, recourse to international judicial institutions for the settlement of maritime disputes faces certain challenges, emanating both from States, and from the judicial institutions themselves. The contribution of international judicial institutions towards peace and stability is dependent on the position taken by the various actors within the system.

Therefore, while not calling into question, in any way, the value of adjudication and arbitration in the settlement of maritime disputes, particularly as an increasing number of disputes are being submitted for settlement under Part XV of the Convention, it is worthwhile to reflect as to how emerging trends in international relations may impact upon the ability of arbitral and judicial bodies to assist States in the peaceful resolution of their disputes.

²⁸General Assembly resolution 72/249, A/RES/249, *International legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction*, paragraph 1.

²⁹United Nations A/AC.287/2017/PC.4/2, *Report of the Preparatory Committee established by General Assembly resolution 69/292: Development of an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction*, Section A, Part VIII.

Independence of the Luxembourg Judiciary Through a Council for the Judiciary – A Never-Ending Story



Jean-Claude Wiwinius

Around 30 years ago, the European Charter on the Statute for Judges (adopted in Strasbourg, 8–10 July 1988) introduced the concept of a **Council for the Judiciary** in the following terms:

In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary. (cf. paragraph 1.3.)

(...)

Each individual must have the possibility of submitting without specific formality a complaint relating to the miscarriage of justice in a given case to an independent body. This body has the power, if a careful and close examination makes a dereliction on the part of a judge indisputably appear (...) to refer the matter to the disciplinary authority, or at the very least to recommend such referral to an authority normally competent in accordance with the statute, to make such a reference. (cf. paragraph 5.3.)

It was not until November 2006 that the Consultative Council of European Judges (“CCJE”), a body composed exclusively of independent judges from the 47 Member States of the Council of Europe (of which I have been a member since it was formed in 2000) decided, at its general meeting, to focus its 2007 work on the concept of a “Council for the Judiciary”. This work was prepared by a working group at a meeting held in Graz, Austria, and I was lucky enough to form part of that working group. Its preliminary work was finalised at the CCJE’s general meeting held on 23 November 2007 and led to the publication of Opinion No. 10 (2007) on

President of the Superior Court of Justice and of the Constitutional Court of Luxembourg.
Article translated from French by Sarah Jannarely.

J.-C. Wiwinius (✉)

Superior Court of Justice, Luxembourg City, Luxembourg

Constitutional Court, Luxembourg City, Luxembourg

a “**Council for the Judiciary in the service of society**”.¹ This opinion was based on the deeply-rooted desire of the judges from all Council of Europe countries to safeguard the independence of the judicial system and its judges, in particular from any interference by the executive and legislative branches. To this end, the CCJE recommended that each State should set up an independent body, called a “Council for the Judiciary”, and that the creation and remit of that council should be enshrined in the highest level of basic law or constitutional instrument available in each country.

As regards the **composition** of this independent body, the CCJE recommends that it should be composed of a substantial *majority* of judges, to insulate the Council from the exercise of any type of influence, but it did not completely rule out the possibility that the Council could be composed solely of judges. However, allegations of self-interest, self-protection and cronyism must be avoided.

Judge and non-judge members should mainly be *selected* on the basis of their competence and experience but must not be active politicians. *Judge members* should be selected by the judiciary itself, preferably by their peers following methods guaranteeing the widest representation of the judiciary at all levels. *Non-judge members* should not be appointed by the executive. Even if they are elected by the Parliament, they cannot be members of the Parliament.

In order to better protect and promote judicial independence and the efficiency of justice, the CCJE recommends that a wide range of **tasks** should be entrusted to the Council for the Judiciary. For example, the *selection and promotion* of judges must be carried out in absolute independence, without any interference from the legislature or executive, as well as in absolute transparency and based on a candidate’s merits. The CCJE also recommends that the Council for the Judiciary should be tasked to draw up ethical principles and to advise judges on matters of professional ethics. An ethics committee could also be set up.

The responsibility for organising and supervising both initial and continuous *training* should be entrusted to the judiciary itself or, preferably, to the Council for the Judiciary, directly or in cooperation with training institutions.

The Council for the Judiciary is the proper agency to protect and promote the *image of justice*, where appropriate with the assistance of communications specialists. It may take part in outreach programmes having the goal of improving the understanding and confidence of society with regard to its system of justice. It should be able to respond in the event that judges are challenged or attacked by the media or political figures, for example. It may also be tasked to address court users’ complaints.

At the same time, a parallel idea for the creation of a Council for the Judiciary began to take shape at national level but it got off to a bad start.

¹ Opinion no. 10 (2007) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society, adopted by the CCJE at its 8th meeting (Strasbourg, 21–23 November 2007), available at <https://rm.coe.int/168074779b>.

Based on the model used by the Belgian Council, the Ombudsman in office at that time submitted a proposal, also in 2006, to the Chamber of Deputies and the Government, for a **High Council for the Judiciary**. He believed that it should be a “*sui generis constitutional body, acting in complete independence from the three constitutional powers*”.

He explained, in support of this initiative, that most complaints against the judiciary criticised the slowness of the court system and poor communication between judicial authorities and court users.

He suggested that three main tasks could be entrusted to the Council, namely:

- a) to conduct an external control of the judicial system, with full investigative, control and inspection powers, (...);
- b) to select candidate judges and promote judges, (...) and
- c) to take disciplinary action against judges.

Obviously, in its external control of the judicial system, the High Council for the Judiciary “*would not have any power to interfere with the substance of court decisions, in any manner whatsoever*”.

This initiative was met with a lot of resistance from judges when it was proposed, precisely because it was based on the Belgian model in 2006 and, in particular, because of the composition of the body, as it was composed of a majority of non-judges. For several years, the very idea of a Council was ruled out by many judges as they associated it with this misguided initiative.

Nevertheless, the Government stepped up and, in June 2006, the Minister of Justice, Luc Frieden, organised a national conference for the judiciary. He set up a working group, composed of a majority of judges, tasked to “*consider the various issues affecting the status of the judiciary and to make suggestions*”. At its plenary meeting held on 9 February 2007, the working group’s progress report was adopted. The report recommended the establishment of a “**National Council for the Judiciary**”, enshrined in the Constitution, covering not only the ordinary courts and prosecutors but also the administrative courts.

The idea was gaining ground. The 2009 government programme included the creation of a “**National Council for Judges to safeguard the independence of the judicial system**.” This new body was to be composed of a majority of judges and would be given constitutional protection in the new Constitution, under the constitutional reforms already underway.

The Government at that time wanted the Council to engage in an essential administrative reform of the justice system, to safeguard the quality and efficiency of the judicial system in Luxembourg. Interestingly, the government programme expressly referred to the work of the Council of Europe discussed above, mainly Opinion No. 10 of the CCJE and the European Charter on the Statute for Judges, as the Government aimed to bring Luxembourg into compliance with European standards.

In 2011, a new working group was created by the Minister of Justice, François Biltgen. This group was composed of senior judges, the President of the Luxembourg Bar Association and representatives from the Ministry of Justice, and it

recommended that the Council should be tasked to safeguard the independence of the justice system and support the administration of justice.

Its proposed remit was as follows:

- appointment and promotion of judges,
- recruitment and training of trainee judges,
- judicial training,
- professional ethics,
- disciplinary action against judges,
- court users' complaints,
- proper operation of courts and the prosecuting authorities.

It recommended that the Council should have fifteen members: a majority of judges (two thirds) combined with persons external to the judiciary.

In Opinion No. 48.433 on the proposed constitutional reform of 6 June 2012, the Council of State (*Conseil d'Etat*) agreed with the Government on the importance of a Council for the Judiciary “to avoid any suggestion of political interference in the appointment and discipline of judges”. The Human Rights Advisory Committee (*Commission Consultative des Droits de l'Homme*) also stated that the creation of a Council for the Judiciary would play an essential role in safeguarding judicial independence.

Following these recommendations, the Minister of Justice who commissioned the work presented a legislative proposal at a press conference held on 27 February 2013. The preamble emphasised that: “*The National Council for the Judiciary safeguards the independence of the judicial authorities and a proper administration of justice.*”

And also stated that “*Luxembourg is one of the few countries not to have adopted a body of this type.*”

In the legislative proposal, the National Council for the Judiciary was given the following powers:

- to submit proposals to the Grand Duke for judicial recruitments and appointments, covering both judges and prosecutors, thus ensuring that public prosecutors would become independent from the government and, in particular, the Ministry of Justice;
- to examine disciplinary cases against judges and request disciplinary action before the appropriate authorities;
- to draw up rules of conduct and professional ethics for judges and to advise judges on those rules;
- to promote and protect the image of justice. The Council would be tasked to collect and process court users' complaints relating to the administration of justice.

More specifically, the Minister of Justice proposed that the appointment and career progress of judges should be based not only on the length of their professional service in the judiciary, but also on their professional and personal qualities, the continuous training undertaken and the results of any professional assessments.

Under those proposals, the Grand Duke would be bound by the candidate proposed by the National Council for the Judiciary and, therefore, the Minister of Justice would cease to be involved in the appointment of judges. The judicial appointment decrees issued by the Grand Duke would be countersigned by the President of the National Council for the Judiciary and not by a member of the Government.

Under the Minister of Justice's proposals on judicial discipline, the Council would initiate disciplinary proceedings, consider disciplinary cases and refer them to the appropriate authorities with the power to take disciplinary action. He proposed a two-tier system: at first instance, disciplinary cases would be decided by the Court of Appeal (*Cour d'Appel*) or the Administrative Court (*Cour Administrative*) with a right of appeal to a new Supreme Court.

The judicial authorities were then consulted about these new proposals. The opinion of the Superior Court of Justice (*Cour Supérieure de Justice*) is very interesting. It approved the creation of a Council in principle, to safeguard and improve the independence of justice and judges. According to the Superior Court:

- The legislation submitted to us for our opinion raises a number of issues in relation to the appointment and career progress of judges. This Court welcomes the fact that the NCJ has been granted the power to propose candidates for all vacant posts within the judiciary, covering both judges and prosecutors.
Where candidates have the same level of professional and personal qualities, their length of service should be decisive.
For senior overseer positions, candidate profiles should be checked to ensure that they match the required profile.
- The NCJ must be responsible for recruiting and training trainee judges and for the continuous training of judges.
- This Court hopes that the NCJ will draw on the compendium of ethical obligations adopted on 16 May 2013 at a joint meeting of the Superior Court of Justice and the Administrative Court.
- It is this Court's opinion that the disciplinary provisions of the proposal submitted to us leaves many questions unanswered and creates more problems than it solves. This Court hopes that the reform of the statutory provisions on discipline will be completed as swiftly as possible.
- This Court agrees that the NCJ should handle court users' complaints, but caution should be exercised in this area. Complaints should never be allowed to interfere with the administration of justice.
- The promotion of justice outside the judiciary and the protection of the image of justice and the judiciary are very important powers for the NCJ.
- In the interest of avoiding any allegations of self-interest, self-protection or cronyism, this Court agrees that the NCJ should be composed of judges and persons external to the judiciary. Three quarters of its members should be judges and they should be appointed ex officio. The NCJ should not exceed a limit of nine members.

In my inaugural address given on 6 October 2016 as President of the Superior Court of Justice, focusing on the independence of judges, I also presented some of my thoughts on the concept of a Council for the Judiciary:

A council for the judiciary is an independent body, enshrined in the law or, preferably, given constitutional protection, designed to safeguard the independence of justice and the independence of each judge and to thus promote an efficient operation of the court system.

Under international standards, a substantial majority of its members must be members of the judiciary.

Referring to a document called “*Pistes de Réflexion*” (Areas for Further Thought) written by Mr Robert Biever, an honorary prosecutor general, I emphasised the following points:

The creation of a **National Council for the Judiciary** is essential, having as one of its core tasks the submission of judicial appointment and promotion proposals to the Grand Duke, for all judges and prosecutors. Although it is quite true that the most senior judges are appointed from three candidates proposed by the Superior Court of Justice, the fact remains that the Government is ultimately responsible for their appointment. (...)

Accordingly, the creation of an NCJ would be a very welcome reform and would help protect the integrity of the Grand Duchy of Luxembourg by avoiding allegations that judicial appointments are political choices undermining judicial independence, even though those allegations are mainly academic.

In order to achieve its stated aim of protecting and safeguarding the independence of justice, it is my view that the Council for the Judiciary has a role to play in both the selection and careers of judges and also professional ethics and disciplinary matters. It should handle court users’ complaints and even be responsible for the training of judges. I also believe that individual judges should be able to turn to that body for protection from any undue interference in the performance of their duties. (...)

The Government was quick to react. At a press conference held on 16 March 2017, more than 4 years after the “Biltgen proposal”, Félix Braz, Minister of Justice, presented the government’s proposed reform of the judicial system as part of a more general constitutional reform.

The basic principles of the new **Supreme Council for the Judiciary** were announced in a press release:

(...) We aim to create a body that will take effective action, through strong powers and a reasonable number of members.

Although the Supreme Council for the Judiciary needs basic constitutional protection, the relevant provisions of the Constitution will only set out the main principles governing the remit and composition of this body
(...)

The Supreme Council for the Judiciary will be given powers to act in the following areas for all members of the judiciary:

- organising and overseeing recruitment and training;
- submitting appointment proposals for judicial positions;
- producing professional ethics recommendations and monitoring their implementation;
- initiating, examining and deciding disciplinary cases at first instance, with a right of appeal to an ad hoc court.

The Supreme Council for the Judiciary will also have the following responsibilities:

- collecting and handling court users’ complaints relating to the administration of justice;
- submitting recommendations to the Chamber of Deputies and the Government on ways to improve the administration of justice;
- implementing public relations initiatives in areas falling within its remit and powers, including in response to events damaging the image of justice or the reputation of a member of the judiciary.

Lastly, the Supreme Council for the Judiciary will have seven members:

- the President of the Superior Court of Justice;
- the Chief Public Prosecutor;
- the President of the Administrative Court;
- one judge elected by his or her peers; the judges of the ordinary courts, prosecutors and the judges of the administrative courts forming one single electoral college;
- one academic appointed by the Chamber of Deputies;
- one person with professional experience of relevance to the work of the Supreme Council for the Judiciary, appointed by the Chamber of Deputies;
- one lawyer, jointly appointed by the board of the Luxembourg Bar Association and the board of the Diekirch Bar Association.

A careful examination of this article will reveal that various names have been put forward for this new body:

- High Council for the Judiciary (*Conseil Supérieur de la Justice*),
- National Council for the Judiciary (*Conseil National de la Justice*),
- National Council for Judges (*Conseil National de la Magistrature*),
- Supreme Council for the Judiciary (*Conseil Suprême de la Justice*), and
- Council for the Judiciary (*Conseil de la Justice*).

It is my view that “Council for the Judiciary” is the most appropriate proposal, as it is the most common name used in other countries.

I also wish to include some of the views I expressed at a course of lectures organised by the *Conférence Saint-Yves* on 27 April 2017, focusing on “**The Council for the Judiciary and Transparency**”.

After referring to the CCJE’s Opinion discussed above, I turned to the powers of the Council for the Judiciary and explained that one of the most important features of its independence was its power to select, appoint and promote judges, and that the corresponding rules were decisive in ensuring the quality of the judicial system, establishing public confidence in the justice system and safeguarding judicial independence.

In my opinion, steps should be taken to introduce transparent procedures for the appointment and promotion of judges, based on objective criteria associated with the holding of a judicial office giving precedence to a candidate’s abilities and experience, and therefore, a candidate’s merits. It goes without saying that those procedures need to be insulated from any type of political interference.

Likewise:

One of the core tasks of the Council set up in Luxembourg should be the submission of judicial appointment and promotion proposals to the Grand Duke.

(...)

Given the importance of judges in society and in order to emphasise the fundamental nature of their function, they should be appointed and promoted by an official act of the Head of State who must be bound by the proposal from the Council for the Judiciary. This body cannot just be consulted for an opinion on an appointment proposal prepared in advance by the executive, since the very fact that the proposal stems from a political authority may have a negative impact on the independence of judges.²

²See paragraph 49 of the Opinion, cited above.

Accordingly, the Government must cease all involvement in the appointment and promotion of judges and should only act in accordance with the Council's proposal. The Grand Duke should issue decrees appointing the judges proposed by the Council only.

However, one significant problem remains, as under the current version of Article 45 of the Constitution, all decrees issued by the Grand Duke must be countersigned by the relevant minister.

Under the Biltgen proposal, the President of the Council for the Judiciary was to be given the power to countersign decrees, but the question of the constitutionality of that proposal remained unanswered.

Under the current project, the relevant minister retains the power to countersign those decrees. This means that the minister could decline to countersign a decree issued by the Grand Duke and therefore decide not to accept the proposed candidate. In view of this, it is only logical to wonder whether that reform will actually change anything as judicial appointments will continue to depend on the goodwill of the holder of political power. In any event, this question merits further attention.

As regards judicial training, I explained that the responsibility for organising and supervising initial and continuous judicial training should be entrusted not to the ministry of justice or any other authority answerable to the legislature or the executive, but to the judiciary itself, meaning to the Council for the Judiciary. Court users could only stand to gain from such a reform.³

As regards professional ethics and conduct, I stated that:

judges must be guided by ethical principles of professional conduct in their work. Public confidence in the justice system is a fundamental feature of any democracy and does not arise solely from the independence, impartiality, efficiency and quality of the judicial system. It is also affected by the standard of a judge's personal conduct.

Judges have a duty to meet high ethical standards as an inherent part of their powers. These principles are not mere duties to be fulfilled for fear of disciplinary action. They also provide general guidance to judges on their own conduct.

A Compendium of Ethical Obligations has been drafted and adopted by the Superior Court of Justice and the Administrative Court at a joint meeting held on 16 May 2013 and a copy is available on the Ministry of Justice's official website. It is hoped that the Council will draw heavily on that compendium when determining the ethical rules and professional rules of conduct applicable to judges.

It is my view that court users' complaints criticising the administration of justice should also be handled by the Council. In this way, complaints lodged by the general public with the Public Prosecutor, the Presidents of the courts or the Minister of Justice would all be processed by the same body using a centralised system.

When discussing disciplinary matters, I referred to the CCJE's Opinion discussed above in which the CCJE pointed out the risk that judicial independence could be undermined if judges were exposed to disciplinary sanctions against their decisions but noted that this did not diminish a judge's duty to respect the law.⁴ Judges who neglect their cases through indolence or who are blatantly incompetent when dealing with them should face disciplinary sanctions. However, the CCJE also went on to say that it was important that judges enjoy the protection of a disciplinary

³ See paragraph 65 of the Opinion, cited above.

⁴ See paragraph 95 of the Opinion, cited above.

proceeding guaranteeing the respect of the principle of independence of the judiciary and carried out before a body free from any political influence, on the basis of clearly defined disciplinary faults and also emphasised the provision of an appeal before a superior court.⁵

Promoting the image of justice is a necessary task, as the justice system is often perceived to be complex and impenetrable. The Council should therefore be tasked to educate the general public about the workings of the justice system, to give them a better and more informed idea of how it works.

When discussing the composition of the Council for the Judiciary, I noted that the Biltgen proposal recommended a Council composed of fifteen official members and fifteen alternate members, with judges making up two thirds of the members. But the Superior Court of Justice, in its 2013 opinion, recommended that the number of members should be limited to nine (seven judges and two non-judges), to enable the Council to carry out its work efficiently.

I then explained that it was my view that the judges sitting on the Council should include, ex officio, the three most senior judges (the President of the Superior Court of Justice, the Chief Public Prosecutor and the President of the Administrative Court). The Biltgen proposal also included the President of the Court of Appeal. I explained that I thought it would be a good idea to finally create that position, as it would improve the organic separation between the appeal and final appeal courts. In any event, a representative of the overseers of the first-instance courts (for example a President of a District Court (*Tribunal d'Arrondissement*), a Public Prosecutor or a senior justice of the peace) should also sit on the Council on a rotating basis. I explained that I agreed with the CCJE's opinion that it was essential to include judges elected by their peers. Assuming that the position of President of the Court of Appeal is not created, or if we can presume that the Court of Appeal is adequately represented by the President of the Court of Cassation (*Cour de Cassation*), I can see no reason why the number of elected judges sitting on the Council should not be increased from one judge (the Government's proposal) to two judges.

As regards the three non-judge members, I explained that lawyers were the non-judge professionals with the most thorough understanding of the judicial system. The two other members, who would also need to have some knowledge of the justice system, would be more difficult to find. Obviously, no person with political ties, in the broadest sense of that term, could be appointed.

I concluded my speech by stating that if *"this independent body actually sees the light of day, it will be able to complete its work in a transparent manner; by acting proactively and giving the judiciary an opportunity to prove itself and be accountable for its work, thus restoring the public's confidence in the justice system."*

During my speech at the New Year reception held in January 2018, as the President of the Superior Court of Justice, I noted that some progress had been made in 2017 for the creation of a Council for the Judiciary but that there was still a great deal to be done. Following this, in early March 2018, the Minister of Justice

⁵ See paragraph 63 of the Opinion, cited above.

presented a new legislative proposal, which is currently being considered by the judicial authorities and the Council of State.

As the constitutional reforms have been postponed again (hopefully only until the end of the Chamber of Deputies elections in October 2018 and not indefinitely), this proposal plans to circumvent the problems posed by Article 90 of the Constitution, requiring an opinion of the Superior Court of Justice for the appointment of all senior judges (excluding prosecutors), by incorporating that opinion (as a prerequisite) in the opinion to be issued by the Council for the Judiciary for all judicial positions. This means that the Superior Court of Justice would issue an opinion for all candidates applying for one of those positions and forward it to the Council for the Judiciary, which would then propose a candidate to the Grand Duke based on those opinions.

The 2018 legislative proposal contains the same composition provisions as the 2017 proposal (seven members: four judges and three non-judges).⁶

The Council's remit and powers remain the same too, but further details have been provided. The most notable changes introduced by the 2018 proposal concern its disciplinary powers, as the creation of a two-tier disciplinary court system will be included in the law creating the Council itself and the definition of disciplinary faults and the corresponding sanctions will be included in the amended Judicial Organisation Act of 7 March 1980. According to the drafters of that legislative proposal, these provisions should apply to the ordinary courts (judges and prosecutors), the administrative courts and even the Constitutional Court and the corresponding amendments will need to be made to its organic law.

⁶It is likely that this proposal will be modified by the Government, with the number of judges increasing to six – three members *ex officio* and three elected members, with a resulting total number of nine.

Part III
Reasoning and Language(s)

For Whom Are Judgments Written?



Benedikt Bogason and Þorgeir Örlygsson

1 Introduction

Carl Baudenbacher served as a judge at the EFTA Court in Luxembourg from 1995 to 2018, just short of 23 years, longer than any other judge has served in that post. During that period, he served as President of the Court from 2003 to 2018, 15 years. In accordance with the rules of the Court, he was elected to the presidency by his peers, and his long service as President therefore bears witness to the great trust his colleagues had in him.

One of the two authors of this article served as judge at the EFTA Court from 2003 to 2011, just short of 9 years, and worked closely with Carl Baudenbacher during that time. The other has been an ad-hoc judge at the EFTA Court since 2007, and has also worked closely with Carl Baudenbacher.

It did not escape the notice of the authors of this article, nor of others who worked with Carl Baudenbacher, that the judiciary was his passion, and he invariably emphasised that the judgments of the EFTA Court should be well-reasoned and written in clear language and that they should resolve the issues referred to the Court. In that regard, it made no difference whether he was himself judge-rapporteur or not. In the drafting of judgments, he made strict demands, both of himself and others.

We will permit ourselves to go so far as to assert that Carl Baudenbacher approached the task of drafting a judgment with the attitude of an artist creating a work of art, with perfection as an objective. Bearing this in mind, it is not inappropriate at this milestone, when he is stepping down from his post at the EFTA Court, to discuss in broad terms the writing of judgments.

Justice of the Supreme Court of Iceland, and President of the Supreme Court of Iceland, respectively.

Translated from Icelandic by Jón Skaptason.

B. Bogason (✉) · Þ. Örlygsson (✉)

Supreme Court of Iceland, Reykjavík, Iceland

2 An Icelandic Perspective

Those who make a professional career for themselves in the judiciary would do well to contemplate and debate the jurisprudential question of for whose benefit judgments are written.

Discussion of this sort has occasionally been raised in Iceland, and, as so often is the case, opinion has been divided on the subject. A rather vigorous discussion took place in the late eighties in the last century, beginning with an article published by *Hjördís Björk Hákonardóttir*, former Supreme Court Justice, in *Skírnir*, the journal of the Icelandic Literary Society, in the spring of 1988 (pp. 164–171), entitled “Criticism of the courts of law and reasoning in judgments” (“*Gagnrýni á dómstólana og forsendur dóma*”). The discussion was then picked up again 27 years later in an article written by Benedikt Bogason, Supreme Court Justice and co-author of the present article. In this brief discussion, we intend to review the principal points that emerged in the course of these discussions, as, in our view, they are of relevance to all those who are involved in drafting judgments and to those who for one reason or another need to read judgments and scrutinise their conclusions. It should be noted that the discussions we intend to recount took place in the context of Icelandic law and Icelandic legal tradition, but in fact the discussion could have taken place anywhere in the world and could apply to judgments of both domestic and international courts of law.

Hjördís Björk Hákonardóttir’s article notes that, pursuant to Icelandic law, judgments must be reasoned, as this will show that the conclusion reached is correct and just. Hákonardóttir also noted that law, by its nature, is not the private affair of legal professionals. If Icelandic citizens were to know the law, and to this end have access to the law for the purposes of information, then judges must also be required to write their judgments in a manner that enables an average person prepared to make an effort to understand them and their underlying reasoning. According to Hákonardóttir, judgments exert a similar effect as domestic law on people’s rights and obligations, and a judgment must therefore form a part of domestic law. In that sense, the conclusion of each individual case must be of relevance to everyone.

*Pór Vilhjálms*son, a long-serving Justice of the Icelandic Supreme Court, a judge of the EFTA Court and President of that Court between 2000 and 2002, and a Judge of the European Court of Human Rights in Strasbourg, responded to Hákonardóttir’s article with an article in the same journal in 1988, entitled “Reasoning in judgments and administrative decisions” (“*Rökfærsla í dómum og stjórnvaldsákvörðunum*”, pp. 378–388). Vilhjálms

district court judgment might facilitate a decision on whether or not to appeal to a higher court. Vilhjálmsón also expressed the opinion that the obligation of judges to set out their reasoning on paper no doubt encouraged more meticulous practices in the courts and might compel judges to scrutinise all the particulars that need to be taken into account. He then added, regarding the question of who should be kept in mind when the reasoning was committed to paper, that “it should generally be sufficient, even desirable, to phrase the reasoning so as to be comprehensible to the parties’ counsels. Usually, however, there should be no need to try to write for the parties themselves or the public.” Nevertheless, there was no objection, in his view, to drafting a judgment in a particular manner if there was likely to be general public interest in the case.

Björn P. Guðmundsson, Professor at the University of Iceland School of Law, was the next to contribute to the discussion in an article published in the Icelandic Law Journal (*Tímarit lögfræðinga*) with the title “Judgments should not be written for someone” (“*Það á ekki að semja dóma fyrir einhvern*”). In the article he expresses disagreement with both Hjördís Björk Hákonardóttir and Þór Vilhjálmsón, saying, among other things: “I am simply of the opinion that a judge should not write judgments “for” anyone at all; instead, a judge is required only on the basis of procedural law to fulfil the legal obligation to resolve the issue in dispute before the court. More precisely, this means that the reasoning underlying a decision should not stand in any subjective relation to the parties to a case or any other persons, but centre exclusively on the matter at hand in each instance.” It also emerged in Guðmundsson’s article that he saw no reason to tailor the drafting of a judgment on the likelihood of public interest in its subject matter. In fact, he felt this might be hazardous, as it might distract the judge’s attention from what the judgment should be focusing on, that is to say, the matter at issue.

Jón Steinar Gunnlaugsson, former Supreme Court Judge, was next to contribute to the debate in a response to Björn P. Guðmundsson’s article, published in the Icelandic Law Journal, 1989, pp. 135–136, entitled “Reasoning is not least for the judge himself/herself” (“*Rökstuðningur er ekki síst fyrir dómarmann sjálfan*”). In his words, a judgment was drafted for whomever might wish to read the judgment at any time, whatever the purpose of the reading and whether the reader was a party, a party’s counsel, another judge, a journalist or a member of the general public. The principal requirement regarding the reasoning of a judgment was that it must reveal the judge’s reasons for arriving at the eventual conclusion based on the parties’ statements of their respective cases. And the judgment, according to Gunnlaugsson, was also drafted for one more person, that is to say the judge doing the writing, which was perhaps most important of all. In Gunnlaugsson’s opinion, there was certainly nothing more likely to protect the citizenry from wrong judgments than a stringent demand for judges to provide reasoning for their judicial decisions. Through sound and meticulous reasoning, a judge would earn trust which in the end could result in the public viewing him or her as an omniscient sage.

The final word in these exchanges belonged to *Garðar Gíslason*, former Supreme Court Justice, in an article he wrote for the Icelandic Law Journal, 1989 (pp. 145–147), under the title “Reasoning in judgments” (“*Rökstuðningur dóma*”). In his

words, the reasoning process was a means in the rule of law to enable verification of whether justice has been done or not. The reasoning, according to Gíslason, was the means for the parties to a case to see whether they should have lost the case or not, and without the reasoning this could not be known. Gíslason also noted that there was a great deal of truth in the assertion that a judge wrote the reasoning for himself or herself. If a judge wanted to hand down a correct verdict, he or she would have to exercise care and refrain from passing judgment until bound by his or her own reasoning. This way, there would be no question of preference, arbitrary decisions, political bias or personal interests. The judge would be liberated from all such influences and his or her conclusions would be dictated solely by the law. The judge would then be at peace with the conclusion, and the parties as well; and the judge would be on firm ground in debating the decision with anyone.

Twenty-seven years after the above debate had taken place in the context of Icelandic law, one of this article's co-authors, *Benedikt Bogason*, entered the field with an article in a commemorative edition of *Úlfjótur*, the journal of law students at the University of Iceland (pp. 349–377), entitled “On the drafting of judgments in civil suits” (“*Um samningu dóma í einkamálum*”). At the outset, in his article, Bogason points out that when a court has resolved a particular issue, the conclusion may entail the establishment of a certain rule of law in a particular area. Thus, the judgment might set a precedent and be used as a source of law if a similar case were to be brought before a court of law. When this is borne in mind, says Bogason, it is important for judgments to be accessible, a requirement that is inherent to the rule of law.

Bogason also noted that access to judgments is not merely a matter of their availability to everyone on the Internet, as has been the case in Iceland for years, but the requirement must also be made, to the extent possible, for judgments to be presented in a way which is understandable to any enlightened member of the public, wishing to scrutinise conclusions reached by the courts of law. This access to judgments in the wider sense, according to Bogason, is also a precondition for discipline in the courts of law and for judgments to have the value as guidance that they are intended to have.

In the conclusion of his article, Bogason notes that, even though it is not his intention to examine to the core the issue of for whom judgments are written, they can hardly be said not to be written for “anyone at all” or that judgments are written for “whomever might wish to read the judgment at any time”, as if judgments were written for no-one or everyone. Bogason thereby rejects the views expressed by Björn Þ. Guðmundsson and Jón Steinar Gunnlaugsson, as recounted earlier.

Bogason goes on to say that it differs, depending on the issue in question, how accessible judgments can be; some cases are by their nature simple and accessible, while others are complex and hardly suitable for useful reading by anyone but those who possess the required expertise. In such instances, judges should not be expected, based on the practices that have been shaped over time, to make a special effort to draft their judgments so as to be easily understandable to the general public. Nevertheless, the best course is obviously for a judge to make every attempt to make complex issues accessible, though, in reality, there are limits to the lengths that can

be gone to this end. On the other hand, a judge should hardly give any consideration as to whether there is general interest in the case and draft the judgment accordingly. To the extent possible, the judge should avoid such considerations altogether, as they could conceivably exert a conscious or subconscious influence. Thus, Bogason rejects the viewpoints expressed by Þór Vilhjálmsson and outlined above. In conclusion, Bogason expresses his agreement that clear reasoning that leads to a conclusion benefits the judges themselves, as it indicates that the judge observed only the law and not any personal bias or other improper viewpoints. Bogason thereby agrees with the viewpoints expressed by Garðar Gíslason, as recounted earlier.

3 Judgments of the EFTA Court

In general, the same principles should apply whether a judgment is drafted in a domestic court or in an international court. It should be noted, however, that a judgment rendered by an international court is rooted in international agreements underlying the collaboration between states on the issues in question. If one looks at the international co-operation within Europe, on the one hand in the European Economic Area and the European Union, and on the other hand in the Council of Europe, on human rights, it is clear that the co-operation is extremely diverse and extensive, covering most aspects of society in the collaborating countries. This means that the judgments of the EFTA Court, the Court of Justice of the European Union and the European Court of Human Rights are extremely wide in their scope. It must be assumed, therefore, that a judgment rendered by these courts on a specific issue could in many cases have an impact in all Member States. This is sure to have an influence on how a judgment is written, in order to enhance its value as guidance in other circumstances. This contributes to objective of homogeneity, which not only ensures a harmonised functioning in the fields of trade and economic affairs, but also contributes to the protection of human rights in all the countries involved.

With this in mind, it is interesting to examine how the EFTA Court is regarded as having performed in this aspect in its drafting of judgments over the quarter of a century, or slightly less, that the Court has been in existence. This subject was discussed by Professor *Ian S. Forrester*, QC, and now a Judge of the General Court, in “The EEA and the EFTA Court”, a book published in commemoration of the 20-year anniversary of the Court in 2014; the essay was entitled “The Style of the EFTA Court”, and attracted extensive attention. Forrester makes the point that the EFTA Court has the great advantage of smallness and of using only one language. He advances the proposal that the style of the EFTA Court is perceptibly, even if not radically, different from the style of the EU Courts. It seems, he argues, that the EFTA Court could be speedier, since there are only three judges and one language, and its judgments are somewhat shorter and more internally consistent.

After reviewing several judgments passed by the Court, Forrester arrives at the conclusion that the judgments of the Court are easy to read and not excessively long. He also thinks the judgments seem to be little burdened by the repetition of familiar

mantras taken from previous ones. He furthermore argues that the conclusions are rather clear. Conversely, Forrester notes that, with the enlargement of the European Union, the character of judgments from the Court of Justice of the European Union has diminished. He is of the opinion this is regretful, but not a matter for criticism. On the other hand, the judgments of the EFTA Court have never been exuberant, but they have remained intelligible and unconvoluted. Further, Forrester states that there is a great difference between a court of three, using one language (English, which is grammatically tolerant of stretching and of novel structuring), with a moderate case-load, and a court with 39 members (judges and advocates general) and 23 official languages, of which French (which is grammatically rather more conservative) is the working language. He concludes, and rightly so, that it is easier for a small monolingual court, which is not much in the public eye, to reach consensus, remain consistent, and identify sensitivities, determine which questions may best be postponed, and provide intelligent solutions.

In the 4 years since the above was written, nothing has occurred which could significantly change this conclusion. It can therefore be assumed that the contention is as applicable today as it was then. Accordingly, there would be good reason to examine a few judgments that have been passed in cases involving Iceland, where an advisory opinion has been sought from the EFTA Court. However, this cannot be accomplished in a short article like this one; instead, we chose to discuss one particular judgment of the EFTA Court, i.e. the judgment in Case E-15/12, *Jan Anfinn Wahl v the Icelandic State*, where Carl Baudenbacher was Judge-Rapporteur. This judgment of the EFTA Court is, in our opinion, one of the clearest examples of an advisory opinion where the EFTA Court has been at its most successful, and exerted a clear and decisive influence on the conclusion of a domestic court. The authors of this article were among the judges in the case when it was before the Supreme Court of Iceland and the advisory opinion of the EFTA Court was under deliberation; the judgment in question is the judgment of the Supreme Court of Iceland of 17 October 2013 in Case No. 191/2013, *Jan Anfinn Wahl v the Icelandic State*. The point of view from which we write this article, therefore, is that of the bench of the court rather than the counsel, as is the case with Forrester.

4 The Hells Angels Case

By a decision of the Icelandic Directorate of Immigration, a Norwegian citizen was turned away from Iceland when he was on his way to visit the country. Upon arrival to Iceland, customs officers discovered clothing carrying the insignia of the Hells Angels motorcycle club, and the person in question admitted to being a member of that organisation in Norway. This foreign national did not have a criminal record, and explained that the purpose of his journey was to meet with friends in a certain Icelandic motorcycle club. At the time in question, that club was applying for membership of the Hells Angels international organisation, and subsequently obtained

full membership on the recommendation of its Norwegian charter at a meeting of European Hells Angels leaders in Manchester, England.

There is no denying, judging from the documents of the case, that the Icelandic authorities were not overjoyed at the prospect of the Hells Angels organisation putting down roots in Iceland, and they impeded the process in a number of ways. According to a danger assessment carried out by the Analysis Department of the National Commissioner of the Icelandic Police, “organised criminal associations of motorcyclists,” such as the Hells Angels, were regarded in the Nordic Countries as a growing threat to the community, and it was noted that national police commissioners in Scandinavia had established a clear policy of combating such activities. For this reason, the Icelandic authorities had decided, in light of the nature of the organisation and its links with organised crime, that it was necessary to stop members of the organisation from coming to Iceland on grounds of public policy and security.

The Norwegian motorcyclist did not accept this treatment and sued the Icelandic State for damages (Judgment of the Supreme Court of Iceland of 17 October 2013 in Case No. 191/2012, *Jan Anfinn Wahl v the Icelandic State*). Among the sources of law which came into question in the case was Article 27 of Directive 2004/38/EC on the right of citizens of the European Union and their family members to move and reside freely within the territory of the Member States. According to that provision, the Member States may restrict freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. Furthermore, the provision states that measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not, in themselves, constitute grounds for taking such measures. Following oral pleadings before the Supreme Court, the judges concluded that it would be necessary to obtain an advisory opinion regarding the interpretation of this provision, and submitted a series of questions to the EFTA Court, to which the Court responded in its judgment (Judgment of 22 July 2013 in Case No. E-15/12, *Jan Anfinn Wahl v the Icelandic State*). Following the delivery of that judgment, the process was resumed before the Supreme Court.

One of the questions submitted by the Supreme Court to the EFTA Court was whether it was a prerequisite for denial of entry to a citizen of an EEA State on the basis of Article 27 of the Directive that the Member State had previously outlawed the organisation of which the individual in question was a member, and prohibited membership of such organisation in the state. The response from the EFTA Court was that an EEA State was not required to have outlawed an organisation or membership of the organisation in order to deny access by a citizen of another EEA State to its territory, provided that such action was regarded as appropriate in the circumstances. However, it was stipulated in the judgment that the EEA State must have defined its standpoint regarding the organisation in question in a clear manner, and taken administrative measures to counteract its activities when these were regarded as a threat to public policy and public security. In accordance with this response, the

judgment of the Supreme Court recounted the manner in which the Icelandic government authorities had, in a clear manner, defined their position regarding the Hells Angels and taken administrative actions for the purpose of counteracting their activities, which were regarded as posing a threat to public policy and public security. Accordingly, the Supreme Court concluded that the conditions laid down in the conclusion of the response from the EFTA Court to this question were fulfilled.

The Supreme Court also asked the EFTA Court whether Article 27 of the Directive should be interpreted as meaning that the mere fact of considering, on the basis of a danger assessment, that an organisation to which an individual belongs is connected with organised crime and the assessment is based on the view that, where such organisations have managed to establish themselves, increased organised crime has followed, was sufficient to consider a citizen of the Union to constitute a threat to public policy and public security. Regarding this point, the EFTA Court concluded that denial of entry on grounds of public policy and public security could be based on a danger assessment alone, subject to fulfilment of certain conditions. These conditions included, *inter alia*, that the danger assessment must disclose the role of the individual in question in the organisation, that the organisation was associated with organised crime, and that where such an organisation has managed to establish itself, organised crime has increased. The Supreme Court addressed all these matters in the light of the judgment of the EFTA Court and concluded, particularly in light of the fact that the arrival of the Norwegian motorcyclist was connected with the admission of an Icelandic motorcycle club to the international organisation of Hells Angels, that he had exhibited personal conduct which represented, or was likely to represent, a genuine and impending threat to public policy and public security. It was therefore concluded that his deportation was permitted, and the State was acquitted of his claim for damages.

This case is, in our opinion a good example of, on the one hand, the role of the EFTA Court in interpreting the rules of European law that come into question and, on the other hand, the role of the domestic court in question in applying those rules in a specific case on the basis of the evidence presented. In this case, the Supreme Court of Iceland had directed complex questions to the EFTA Court, to which that court responded in detail, thereby establishing a precedent which could apply in the event of similar circumstances arising in an entirely different state in the European Economic Area. This process contributes to the achievement of the EEA Agreement's objective of homogeneity.

5 Final Words

As noted earlier, a number of other judgments of the EFTA Court could be cited where the Court has been singularly successful in responding to questions submitted by domestic courts, and thereby unequivocally and decisively influencing the resolution of issues before domestic courts. However, the judgment in the *Hells Angels* case is sufficient for our purposes, as it is, as mentioned earlier, a judgment

where the EFTA Court has been at its most successful. This judgment is, in our view, an example of a judgment where the conclusion entails the establishment of a rule of law, meaning that it may set a precedent and become a source of law if a similar case is brought subsequently before a domestic court. In addition, the judgment of the EFTA Court in this case has the great advantage of being written in excellent language, and presented so as to be comprehensible to any enlightened member of the public who wishes to understand conclusions reached by the courts of law.

Finally, we would like to express our gratitude to Carl Baudenbacher for the pleasure of working with him and for his sound friendship in the course of the years. It has not only been satisfying from a professional standpoint to work with him, but also a pleasure to have enjoyed his friendship.

On Understanding and Being Understood – The Judicial System, Communication and the Public



Anne-José Paulsen

The question whether or not the judicial system is understood by the general public presupposes the prior question, namely, whether it is, or ought to be, a concern of the judicial system that the public does not simply note its existence but also understands its workings. In other words, to what extent is the pursuit of public information work by the courts appropriate or even advisable? Is the status quo satisfactory or excessive? Or would it be better to increase activities in this area? What are the benefits of actively pursuing press and public information work and are they proportionate to the efforts involved? What are the limits of reasonable press and public information work? Many of these issues remain unresolved.¹

The view is widespread, in particular amongst the judiciary, that the judicial system should concentrate on its core business. The Federal Constitutional Court has stated that court proceedings are held in public but do not take place for the public.² Although the public nature of court hearings is intended as means of ensuring a fair procedure and information about the events taking place in a hearing is necessary for controls of that kind,³ a central task of the courts is to reach a ruling in accordance with the legislation and without regard to the person concerned. Crucially, courts act in individual cases. Their task is to adjudicate with regard to specific legal relationships, in other words, in individual disputes between two or more persons or, in the area of criminal justice, to appraise adequately a factual situ-

Former President of the Higher Regional Court Düsseldorf, and Vice-President of the Constitutional Court for the Land of North Rhine-Westphalia.

¹ Compare Von Coelln (2014).

² See the judgment of the Federal Constitutional Court (*Bundesverfassungsgericht*) of 24 January 2001 in cases 1 BvR 2623/95 and 1 BvR 622/99.

³ *Ibid.*

A.-J. Paulsen (✉)

Higher Regional Court Düsseldorf, Düsseldorf, Germany

Constitutional Court for the Land of North Rhine-Westphalia, Düsseldorf, Germany

ation and to reach a finding on the basis of individual culpability. As judgments only take effect *inter partes*⁴ and courts only ever deal with individual cases, why should public information activities of any kind be necessary, let alone useful?

1 Public Information Work by the Courts as a Statutory Duty

1.1 “In the Name of the People”: The Obligation to Publish Court Rulings

Legislation specifies that courts in Germany shall deliver their judgments “in the name of the people” (Section 311(1) of the Code of Civil Procedure (*Zivilprozessordnung*) and Section 268(1) of the Code of Criminal Procedure (*Strafprozessordnung*)). A judgment must be handed down using that phrase. It appears as the heading above every judgment. This requirement derives from Article 20 of the Basic Law (*Grundgesetz*). It provides that ‘all state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies.’ Thus, the introductory phrase of each judgment refers to the fact that judicial bodies have democratic legitimacy and, as a consequence, are subject to control by the public.⁵ However, this rule simply indicates that law and the public are closely linked. There is no specification that the judicial system must pursue press and public information work, in other words, that it must, for example, actively inform the public in connection with court rulings and judicial matters.

The Law on the Court System (*Gerichtsverfassungsgesetz*) sets out specific rules on the relationship between the public and the courts. Sections 169 and 173 of that law expressly provide that hearings before the adjudicating court, including the pronouncement of judgments and orders, shall be public. Further, Section 169 of the Law on the Court System was amended recently to allow for audio and TV recording of the pronouncements of rulings by the highest federal courts.⁶ The amendment was introduced to reflect developments in case-law and changes in how information is communicated in the media.⁷

⁴In relation to civil cases, compare, for example, Gottwald (2016), paragraph 1. Likewise, rulings in criminal cases are, as a rule, not binding in other cases, not even in follow-on proceedings (for example, an action for damages) even where the facts of the case concern the same victim and offender. Compare the judgment of Zweibrücken Higher Regional Court of 1 July 2010 in case 4 U 7/10.

⁵Feskorn (2018), paragraph 1.

⁶Amendment inserted by the Law on expanding media coverage of court proceedings (*Gesetz über die Erweiterung der Medienöffentlichkeit in Gerichtsverfahren*) of 8 October 2017.

⁷Explanatory memorandum to the Federal Government draft of the Law on expanding media coverage of court proceedings of 31 August 2016. According to the explanatory memorandum, in the

However, the principle that court proceedings are in their nature public means not only that court proceedings may, in principle, be attended by anyone and that access by the public⁸ – and now in individual cases before the highest courts even media broadcasting possibilities – must be ensured. Case-law and commentators are almost unanimous in the view that, alongside their express obligations under Section 169 of the Law on the Court System, the court authorities are required to publish court rulings that merit publication.⁹

The underlying reasons were summarised by the Federal Administrative Court (*Bundesverwaltungsgericht*) in a 1997 ruling.¹⁰ The obligation on courts to publish their rulings results from the rule of law principle, including the obligation to ensure justice, and the principles of democracy and the division of powers. Moreover, the nature of court rulings means that they provide detail on legislative provisions and develop the law. In addition, according to the Federal Administrative Court, “in an increasingly complex legal order, an individual must be able to ascertain reliably the rights that he has and the obligations to which he is subject; the possibilities and chances of obtaining individual legal protection must be substantially foreseeable for him. In the absence of adequate publication of the case-law, this is not possible.”¹¹ Furthermore, rulings pronounced in a democratic state governed by the rule of law must be open to public criticism. Individuals must be in a position to act upon a legal development that they consider worrying with a view to bringing about (legislative) amendment. It follows from the principle of democracy that developments in public opinion must be capable of providing an impetus for parliamentary revision of legislation that has given rise to a particular ruling. Moreover, it furthers the administration of justice if the publication of court rulings encourages professional and academic debate.¹²

Thus, to summarise the position so far: according to the prevailing view, the judicial system is required, as a matter of constitutional law, to publish court rulings (meriting interest). Consequently, a certain proportion of the press and public information work of the judicial system – the active publication of court rulings – is mandated “as a direct constitutional task”.¹³

light of technological and societal changes, the existing strict legal prohibition on video and audio transmission was no longer in keeping with the times. It noted that livestreams of public events have become widespread and supplement or increasingly are replacing traditional forms of reporting. Print media also now take account of internet reporting and new forms of communication such as internet blogs or the messaging service Twitter. Moreover, in the case of foreign courts, a trend towards greater media coverage is noticeable.

⁸Compare Lückemann (2018), paragraph 2.

⁹Finding of the Federal Administrative Court (*Bundesverwaltungsgericht*) in its judgment of 26 February 1997 in case 6 C 3/96, citing numerous references to case-law and legal commentators.

¹⁰Federal Administrative Court, judgment of 26 February 1997 in case 6 C 3/96.

¹¹*Ibid.*

¹²*Ibid.*

¹³*Ibid.*, first paragraph of the official headnote.

1.2 *The Form in Which Court Rulings Are Published*

It is reasonable to ask, however, whether the judicial system discharges its task adequately when court rulings – naturally anonymised and redacted to hide confidential details such as commercial secrets – are published simply as worded. It is self-evident that the detailed wording of court rulings, setting out, for example, an analysis of complex legal problems or observations on issues of jurisdiction or procedural nuances, is not necessarily comprehensible to all at first glance. Hence, the conclusion is inescapable that the obligation to publish court rulings requires judicial authorities also to explain their substance or at least to publish a simplified version. This follows, ultimately, from the reasoning of the Federal Administrative Court in detailing the obligation to publish court rulings. According to that Court, individuals should be placed in a position to act upon a legal development that they consider worrying. However, that is only possible where the individual understands what is at issue and, ideally, can appreciate the reasons why a court has reached a particular ruling. In other words, it does not suffice for an individual simply to be given access to published court rulings. Publication should also take place in a form that the general population understands. Naturally, it is impractical to presume that each and every ruling could be published also in a form that is comprehensible to the general population. However, for rulings that are of public interest, this would be highly desirable.

It is important to clarify here that this is not a matter of courts seeking to reflect public opinion as such. Also the phrase “in the name of the people” cannot be understood to mean that a ruling is dependent on popular opinion.¹⁴ Even less is this an issue of playing to a particular opinion, encouraged perhaps by the media. Equally wrong would be the objective that everyone should agree with a judicial ruling. No, the core concern here is to explain and increase understanding of judicial rulings and the associated proceedings and procedures.

To make court rulings accessible in a form comprehensible to the general public (in addition to full text publication), an appropriate tool is the press release to accompany the ruling. In the ideal situation, at almost the same time as a judicial body issues a ruling, the judicial authority will publish a press release that summarises and explains the ruling. Naturally, the press release may not be published until the parties have had the opportunity to learn of the ruling.¹⁵ In appropriate cases, the press release may be issued together with an anonymised full text version of the ruling. The press release can then refer to the full text version and – given that digital versions are generally issued – can also include links to that document. If technical terms cannot be avoided, the press release can include (for example, in an

¹⁴ Feskorn (2018), paragraph 1.

¹⁵ Section 7(5) of the Guidelines for working with the media (*Richtlinien für die Zusammenarbeit mit den Medien*), General Decision of the Ministry of Justice (*Allgemeinverfügung des Ministeriums der Justiz*) of 12 November 2007 (1271 - II. 2) – *Justizministerialblatt für das Land Nordrhein-Westfalen* (2008) 2 – as amended on 28 July 2015 – *Justizministerialblatt für das Land Nordrhein-Westfalen* (2015) 329.

annex or linked explanatory material) an explanation of these terms in everyday language. Media representatives and interested members of the public are thus placed in a position in which, on the basis of the accompanying press release, the anonymised full text version of the ruling and the explanatory material detailing specific terms or legal provisions, they can follow and appreciate the substance of the ruling.

1.3 Obligation to Engage in More Extensive Public Information Work

Beyond the obligation to publish court rulings, the judicial authorities could also be required to engage in more extensive public information work, for example, to provide background information during the course of legal proceedings. However, there is no legislative norm that sets out a requirement of that kind. Admittedly, the press laws of the *Länder* establish the right of the press to be given information.¹⁶ However, those statutes do not specify an obligation to engage actively in public information work.

On the other hand, administrative guidelines on working with the press exist which clearly specify an obligation to engage actively in public information work going beyond the mere communication of rulings. For example, in Northrhine-Westphalia, the Guidelines for working with the media¹⁷ provide: “Press officers shall also pursue public information work. They should use every opportunity to raise awareness concerning the legal system.” In addition, they specify that in factually complex or legally difficult cases the media may be provided with an introduction before the hearing takes place.¹⁸ The question of whether and, if so, to what extent, this administrative guidance produces third-party effects need not be resolved here. What should be clear, however, is the task that is directed to the judicial authorities: at every opportunity and, in appropriate cases, especially during the course of the proceedings, public awareness should be raised on matters concerning the justice system, court proceedings and judicial rulings.

Thus, to summarise the position so far: there is an obligation derived from the constitution to publish and explain important court rulings in a form that is understandable to the general public. In addition, administrative guidelines require the judicial authorities to promote public awareness on the work of the courts.

¹⁶ Compare, for example, Section 4(1) of the North Rhine-Westphalia Law on the press (*Landespressegesetz NRW*).

¹⁷ General Decision of the Ministry of Justice (*Allgemeinverfügung des Ministeriums der Justiz*) of 12 November 2007 (1271 - II. 2) – *Justizministerialblatt für das Land Nordrhein-Westfalen* (2008) 2 – as amended on 28 July 2015 – *Justizministerialblatt für das Land Nordrhein-Westfalen* (2015) 329.

¹⁸ Section 7(4) of the abovementioned General Decision.

2 Substantive Reasons for the Active Pursuit of Public Information Work

Aside from the legal obligation set out above under which the judicial authorities are required to engage actively in public information work, there are also good substantive reasons for providing the public with high quality information on justice issues. First, the active pursuit of public information work provides an opportunity to communicate undistorted information on cases before the courts. Second, active engagement by the judicial authorities in public information work has an important wider impact, generating and strengthening public confidence in the justice system.

2.1 *Correct Reporting*

Judicial colleagues find it particularly annoying when press reports are, in their view, inaccurate. This happens, for example, when the reports of the facts are unbalanced or one-sided, the wrong terms are used for legal remedies or sections from the headnote are quoted without sufficient context.¹⁹ These are all issues that can be countered through the courts' active engagement in press and public information work.²⁰ If the judicial authorities take the initiative to provide the media with information concerning the case facts and explain the meaning of legal terms, this can prevent inaccurate or coloured reporting. Inaccuracies in the citation of case numbers or in the terminology used to describe legal remedies – mentioned here simply as an illustration of the many conceivable errors – probably cannot be avoided in their entirety. But, at least, they can be contained. The more media organisations can take advantage of original statements issued by the judicial authorities, the fewer the material errors may be anticipated in their reporting. Informal briefings by judicial press officers, providing journalists with explanations and clarifications on a regular basis, are also conducive to proper reporting. And, naturally, it is highly desirable that the reporting of court cases includes an accurate presentation of the facts and arguments, uses the proper terminology for legal remedies and cites the correct case numbers.

¹⁹ Compare Huff (1993), p. 207, who also identifies these issues.

²⁰ The same view is taken by Zülch (1994), pp. 36–37.

2.2 *Confidence in the Rule of Law*

However, the judicial system's interest in engaging in external communication and active pursuit of press and public information work goes far beyond a desire to avoid inaccuracies in reporting.²¹ Media communication of court proceedings and rulings to the public is necessary to retain and promote confidence in the justice system and the rule of law as an organising principle of the state.²² This applies all the more in today's information society.²³ If judicial process does not also take place in the pervasive online media channels, it will hardly be noticed.

Only an individual who is informed about court proceedings and can understand what is taking place or at least is certain that the necessary information can be found in a comprehensible form at any time has reason to have confidence in the justice system. Someone who considers the judicial system to be incomprehensible, an inaccessible "black box", has no occasion to have confidence in the justice system and the rule of law as an organising principle of the state. Someone who is not interested in the rule of law and has no confidence in that principle is potentially a person who, when a situation calling for justice arises, does not make use of the state institutions. In extreme cases, this could lead to mob justice and pockets of lawlessness. If a loss of confidence in the justice system and the rule of law became widespread throughout society, it is not inconceivable that disappointed or even frustrated individuals might enlist with extreme political movements holding out questionable promises in relation to equity and justice. Tendencies of that kind, by which the rule of law is eroded, must be stopped at the outset. The active pursuit of press and public information work can constitute an effective policy tool in this area.

Actors in the judicial system should be conscious of this fundamental interest in an active engagement in public information work. The significance of this interest can hardly be overestimated. Public confidence in the functional capability of an independent justice system is indispensable for the functioning of a democratic state governed by the rule of law. Confidence in the rule of law is an important pillar on which our entire constitutional system rests.

²¹ Article I of the abovementioned Guidelines for working with the media sets out the premise that prompt and reliable information from the press, radio, television, electronic and other forms of mass media promotes the public's understanding of the justice system. In addition, reporting by the media presents valuable assistance for the work of justice system institutions.

²² Compare the statement by the President of the Federal Constitutional Court, Justice Voßkuhle, in an interview with the *Rheinische Post* (Rheinische Post 2018), in relation to the Court's 1995 rulings, known as the "Crucifix judgment" and the "Soldiers are murderers" ruling. He said: "At the time, the Court did not communicate those decisions well, many people in the country did not understand them. As a reaction, Court President Jutta Limbach established a press office, so that the Court would be understandable as a court of the people. The confidence and acceptance of the people upholds the Federal Constitutional Court and it is this support that has given the Court its significance."

²³ The particular demands of the information society were highlighted by the Federal Administrative Court in its judgment of 26 February 1997 in case 6 C 3/96.

The proper functioning of the rule of law constitutes a guarantee for the personal freedom of every individual in society. A state governed by the rule of law guarantees personal freedom without regard to the nature of a person, their sex or their religion. In a nutshell: without the rule of law, there is no personal freedom. And, in turn, personal freedom is essential for the successful personal and economic development of the individual and, thus, also of society at large. Without freedom and the security that such freedom is guaranteed, creative, inventive and entrepreneurial minds find it difficult to flourish. The possibility for development, innovation and progress is heavily limited in the absence of individual freedom that is personally experienced.

And what form of political order is better suited to guarantee the personal freedom of each and every individual than a liberal democracy governed by the rule of law?

A state governed by the rule of law cannot afford to have the confidence placed in it destroyed. If a state governed by the rule of law loses the confidence of its people, an important pillar in support of whole system begins to falter. An entire state, an entire society can become unbalanced. However, the proper functioning of the rule of law as an organising principle of the state is by no means certain.²⁴ A look to the past or beyond Germany's own borders makes the fact of this statement clear. Consequently, ensuring the rule of law as an organising principle of the state is a permanent task that requires the ongoing participation of all relevant actors. And one aspect of this is to reach out to as many people as possible on issues of justice. The active pursuit of public information work by the judicial authorities is an important contribution to attain this task. Consequently, this considerable self-interest in the matter justifies the not inconsiderable human and material resources necessary to ensure the courts' active pursuit of high-quality press and public information work.

2.3 *Taking Responsibility*

In addition, active pursuit of press and public information work by the courts is a practical means of taking responsibility for the activities of the judicial system. In this way, the justice system as a whole shares the responsibility for the cases and rulings of its judges and, at the same time, strengthens their independence. An active self-confident public presence does not simply make the judicial system more real; it also increases its credibility. It communicates the message to the world that the judicial system does not seek to hide behind closed doors, duck away or evade public control. Rather, through the active pursuit of public information work, the

²⁴In an interview with the *Rheinische Post* (Rheinische Post 2018) the President of the Federal Constitutional Court, Justice Voßkuhle, put it as follows: "However, that does not mean that we can rest on our achievements and take for granted the stability of our political system. No democracy is safeguarded from changes. This is something we can witness very clearly in the successful democracies of neighbouring countries which are running into difficulties."

judicial system stands up publicly and effectively for the rule of law, the liberal fundaments of society and the independent rulings of its judges. This signal accompanies every active form of press and public information work by the courts.

Hence, to actively send out this signal, to take responsibility and to stand up for liberal democracy governed by the rule of the law constitutes a personal task and obligation, especially for the president of every court. Generally, court presidents satisfy this obligation by ensuring that each court press and public information office has adequate human and material resources. However, that does not relieve them of the obligation, as the “face” of the court over which they preside, also to regularly ensure those standards through their public appearances. The long-serving President of the EFTA Court, Carl Baudenbacher, was exemplary in every respect in his impressive use of media skills and presence to attain that objective. In doing so, he was not only an excellent public representative of his own court but also provided an important reference point for many other court presidents. Moreover, it was, and continues to be, a rewarding and insightful experience to engage in discussions with this committed champion of the rule of law and judicial independence.

3 An Exceptional Criminal Case: The *Loveparade* Proceedings

How important it can be for the courts to pursue high-quality press and public information work, with a view to establishing maximum transparency, is well illustrated by the *Loveparade* proceedings. The measures taken in that case demonstrate the possibilities open to the judicial authorities to generate press and public information work that is comprehensive, transparent and enhances confidence.

On 8 December 2017, the trial was opened in the *Loveparade* proceedings. Those proceedings, as a judicial investigation into the catastrophic disaster that took place at the *Loveparade 2010* festival, have set and continue to set new standards in many respects. Aside from the magnitude of the tragedy, the judicial authorities were faced with previously unknown challenges. One of the particular challenges was, and also continues to be, communication with the press and interaction with the public.

As the trial is still underway, the presentation here only considers the proceedings from the indictment of the defendants to the opening of the trial.

3.1 *Review of the Events*

On 24 July 2010 tens of thousands of people came to Duisburg to attend the *Loveparade 2010* festival. The festival site could be accessed only through a single entrance and exit. In a narrow section, on a ramp, a crush of festivalgoers took place.

Twenty-one people between the ages of 17 and 38 lost their lives. At least 652 festivalgoers were injured. The victims were nationals of many countries, including the Netherlands, Spain, Italy, Australia, China and Bosnia. The disaster provoked shock, grief and outrage both nationally and internationally. Many politicians and celebrities commented publicly on the event. According to media reports,²⁵ even Pope Benedict XVI remembered the victims of the tragedy in his prayers. Outpourings of public sympathy were registered worldwide.

For days the issue dominated the media and was in the minds of all. Public opinion quickly formed the view that individual culprits had to be found who were responsible for the tragedy. The mood was heated. According to media reports, the mayor of Duisburg, the city that authorised the Loveparade's use of the site, was said to have received death threats and, for that reason, to have moved his family to a location "outside of the city".²⁶ Duisburg Public Prosecutor's Office did not reveal the name of the investigating prosecutor. It explained that it did not want to put the individual concerned at risk.²⁷

It is in light of these dramatic events and developments and against the background of this general public mood that the following measures must be seen.

3.2 *Press Work in Detail*

On 11 February 2014, some three and a half years after the disaster, Duisburg Public Prosecutor's Office announced that it had completed its investigations and that charges would be brought. Details were provided at a high-profile press conference chaired by the head of Duisburg Public Prosecutor's Office. The next day, 12 February 2014, Duisburg Regional Court (*Landgericht Duisburg*) issued a press release stating that the court had received the indictment. The press release, the first to be issued by Duisburg Regional Court in connection with these proceedings, is noteworthy in several respects. First, it is unusual in itself that a court should issue a press release stating that an indictment has been received. Second, the content of the press release is exceptional. Every unavoidable specialist legal term used in the press release was supplemented with background information. That information was connected to the relevant term by means of a link. Hence, on reading the press release, users could click through to the background information, which set out explanations in terms understandable to the general public. For example, explanations were provided for the terms "*Nebenkläger*" (ancillary private prosecutor), "*Adhäsionskläger*" (civil plaintiff joined to the criminal proceedings), "*große Strafkammer*" (grand criminal division, i.e. a criminal division of the Regional Court composed of a greater number of professional judges), "*Zwischenverfahren*" (interim procedure, prior to committal for trial) and "*Hauptverhandlung*" (main

²⁵ BILD (2010) and Rheinische Post (2010a).

²⁶ Westdeutsche Allgemeine Zeitung (2010).

²⁷ Rheinische Post (2010b).

proceedings, i.e. trial). In addition, a link was included to “further information for members of the press” and, finally, members of the press were also invited to sign up to an email list for press information on the proceedings.

On 26 February 2014, Duisburg Regional Court announced that in the event of a full trial, this would take place in the CCD Ost conference hall on the Dusseldorf trade fair site. It indicated that Dusseldorf Higher Regional Court (*Oberlandesgericht Düsseldorf*), as the competent judicial authority, had signed the necessary contracts. It also set out certain financial information, for example, that the rental including ancillary costs would amount to 14,000 Euro for each day of the trial and that if the trial did not go ahead, cancellation costs of 111,000 Euro would be incurred. Preparation and pro-active publication of information of that kind was also exceptional.

Press releases were also issued for seemingly less important steps in the procedure, such as the service of the indictment and the setting of a three-month period for a response,²⁸ a detailed explanation of the criminal law charges levelled in the indictment,²⁹ and an extension of the period for submitting responses.³⁰ Such detailed presentation of legal matters in press releases was previously very rare in the Dusseldorf Higher Regional Court district.

When, by order of 30 March 2016, the Fifth Grand Criminal Division of Duisburg Regional Court refused to commit the accused for trial, it was foreseeable that this ruling would provoke tremendous public interest and major press coverage. The court did all that it could to make its ruling transparent and understandable to the public. The Fifth Grand Criminal Division prefaced its 460-page order with a summary setting out its principal conclusions. That summary was communicated word for word in a press release. In addition, the President of Duisburg Regional Court called a press conference for the day on which the order was released in which he spoke about the ruling and explained it to members of the press. There was considerable media interest. Unlike the ruling, the court’s approach to dealing with the public appears to have been well received.

When in response to an appeal brought by the prosecution Dusseldorf Higher Regional Court ruled on 18 April 2017 that the matter should proceed to full trial, reversing the decision taken at first instance, public interest was also immense. Again, the substance of the decision was explained in detailed press releases and a high-profile press conference. The press conference, like the previous one held in Duisburg, was broadcast live on the internet and could be watched in full by anyone, also after the event. The press releases were produced both in German and English.

In preparation for the trial before Duisburg Regional Court, currently taking place as planned in the CCD Ost, a conference hall on the Dusseldorf trade fair site, on account of the number of defendants, defence counsel and ancillary private prosecutors involved, over 80 seats were reserved for members of the press. The accreditation procedure established quotas for different groups, including one for foreign

²⁸ Duisburg Regional Court press release of 10 March 2014.

²⁹ Duisburg Regional Court press release of 2 July 2014.

³⁰ Duisburg Regional Court press release of 29 August 2014.

media. Even this group was further subdivided into subgroups, including agencies and TV broadcasters, for which separate quotas were also established. The press releases on the nature and form of the accreditation procedure and also on other matters were also provided both in German and English.

These efforts to make the judicial proceedings as transparent as possible and to explain and illustrate the different steps involved reflect how important it is for the judicial system to be understood and come across as credible in this high-profile case. All the usual elements in the repertoire of press relations, in particular the press release coupled with links and explanatory documents and also press conferences, were put to use. In addition, court press officers provided journalists with regular briefings at all stages of the proceedings, explaining in person the proceedings and legal details.

3.3 *Reactions*

That this kind of press and public information work was well received by members of the press requires no further comment. Some even expressed their surprise that the judicial system was pursuing press and public information work of this kind. Not infrequently a desire was signalled that this active form of press and public information work should become a precedent for others.

4 Limits on the Active Pursuit of Public Information Work

Court proceedings are held in public but do not take place for the public.³¹ That statement uttered by the Federal Constitutional Court – notwithstanding the usefulness and necessity of high-quality press and public relations work – should not be lost from view. The core task of courts, that is, to rule in individual cases, must remain a core task.

A statutory limit on the scope of public information work during the course of legal proceedings can be found, for example, in Section 169 of the Law on the Court System which, in principle, prohibits courtroom audio and TV recordings during a sitting. Only as a result of the recent Law on Expanding Media Coverage of Court Proceedings, promulgated on 8 October 2017,³² has that principle been softened to allow for coverage of the pronouncement of rulings by the highest courts. However, the policy decision by the legislature not to permit, as a rule, the live broadcast of court proceedings remains in place. The video or audio broadcast of a court hearing continues to be prohibited, and for good reason. This legislative decision reflects the

³¹ See the judgment of the Federal Constitutional Court of 24 January 2001 in cases 1 BvR 2623/95 and 1 BvR 622/99.

³² *Bundesgesetzblatt* I 2017, No 68, 3546.

particular concern that instantaneous TV reporting could influence the behaviour of courtroom participants, including judges. This may occur consciously, where, for example, individuals seek to perform in a particular way before the camera or, on the other hand, are particularly intimidated by the cameras. However, it is also conceivable that individual behaviour is altered unconsciously when cameras are filming.³³

It is not only the presence of TV cameras that changes the behaviour of courtroom participants. It should not be underestimated how the active pursuit of press and public information work and media reporting as a whole impacts on the actions of participants in the proceedings, including the judges. Where proceedings are reported in the press, very few participants will be entirely unmoved. Once the press is in the room, many act other than they would if only courtroom participants were present. Some even experience a complete change in personality as soon as local reporters are in the courtroom and start taking notes. Also a judge who has press representatives in the courtroom may be influenced by this difference and act other than they would if only the parties and their representatives were present. Although this aspect does not preclude the active pursuit of press and public information work, it needs to be taken into account.

On the other hand, a clear substantive limit on the active pursuit of public information work results from the need to maintain judicial neutrality. It is self-evident that a court may not actively pursue public information work to the disadvantage or advantage of any party. It cannot allow even the impression of such partiality to arise.

It also needs to be remembered that the active pursuit of press and public information work is heavily dependent on those working in the judicial system, in particular judges, being conscious of its usefulness. Namely, these are the people whose work features in the media reporting. Thus, it is part of press and public information work to promote the activity regularly amongst judicial colleagues and to establish an awareness for its importance. Also the judiciary as a whole, acting through the president of each court, has an obligation in this regard. They should offer genuine support for the policy to reduce the usual workload of colleagues who act as press officers.

5 Conclusion

Press and public information work are no longer foreign words in the vocabulary of the judicial system. A significant change has taken place in this regard over recent years. The questions of whether, and if so, how courts should present themselves in public and how rulings and proceedings should be explained and made comprehensible to the public are answered, with good reason, very differently today. Active

³³ Compare the interview with Professor Rainer Schlegel, President of the Federal Social Court (*Bundessozialgericht*), published in *Juris* (2017).

pursuit of press and public information work does more than promote the accuracy of reporting. Active pursuit of press and public information work by the courts is an important and effective mechanism to (re)gain and encourage public confidence in the functioning of the judicial system and in the rule of law as such. The active pursuit of high-quality press and public information work and a professional approach to dealing with the media are, as elements in the permanent task of upholding the rule of law, included in the judicial system's public mandate.

In short: we want to be understood, because we have understood too.

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Vassilios Skouris

1 Introduction: Why Multilingualism?

The close relationship between law and language is obvious. In order to communicate and make ourselves understandable and intelligible, we have to choose a common instrument, a language among all those which are spoken in our world. What are the reasons for this choice, and are they in any way linked to the general question on the relation between law and language?

It is clear that – as it happens in other disciplines – language is the very instrument, the vehicle of law. In reality, law is the intersection of language and power, while lawyers use words in order to persuade, to justify and to govern. There has been an extensive theoretical and philosophical analysis of the relation between law and language in many contributions to the general theory of law, as well as of the fact that linguistic phenomena (ambivalence of terms, use of metaphors etc.) can be a source of delicate semantic and, therefore, legal problems.

One can imagine that these problems become even more complex when a legal idea must be expressed in more than one language, with a multiplying effect if a third, a fourth and so on language is added, which is a normal phenomenon in multinational, supranational and international entities. In this context, the question “*law and language*” changes into “*law and languages*”, and this is exactly the case in the European Union (“EU”). Here, we have to face linguistic issues in form of an extended – if not extreme – multilingualism, which is only logical, because the EU is based on the coexistence of all 28 national legal orders and their respective cultural backgrounds.

Former President of the Court of Justice of the European Union.

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V. Skouris (✉)
Thessaloniki, Greece

The linguistic literature normally divides multilingualism into its individual, social, and institutional forms.¹ Individual multilingualism is related to the multilingualism of human beings; they may be qualified as multilingual, once they are proficient in more than one languages. Social multilingualism refers to the presence of several languages in one society, which occurs when more than one official language are recognized in the same state (e.g. in Belgium, Ireland, Luxembourg, or Malta). Finally, institutional multilingualism refers to the coexistence of several languages within supranational institutions. The EU promotes and practices all three forms of multilingualism.

Multilingualism within the EU can also be described on another basis. On the one hand, there are the respective language regimes applicable to administrative and court proceedings involving citizens and the EU institutions. Language choices are guided here mainly by criteria stemming from human and minority rights. On the other hand, we must distinguish the language regimes applicable to parliamentary procedures and consultations among representatives of the Member States. Those regimes are justified rather by aspects of the equal treatment of states. But in all cases, it is of highest importance to give citizens of the EU “*access to European Union legislation, procedures and information in their own languages*”.²

2 Reasons Militating in Favour of Multilingualism

Which are the reasons militating in favour of the vast multilingualism characterizing the EU?³ What could be seen at first sight as an unjustified indulgence towards “small” and “exotic” languages and as a waste of money is in reality a highly sensitive political and moral question. It is common knowledge that languages fulfil two functions that cannot easily be separated: a communicative function, consisting in the transmission of information in a broad sense, and a symbolic function, associated with cultural and political traits, for example with people’s sense of nationality. Therefore, it is not surprising that the solutions adopted by the EU often represent a compromise between different and contrasting visions about what multilingualism management is.

First, the reasons for determining language management in the EU are related to the EU’s legal order. Given the direct and immediate impact that EU law has on the EU institutions themselves, on Member States and on the subjective legal situation of individuals, the question arises whether it is admissible to ask citizens and companies to comply with EU law without assuring first that this law is produced in a

¹Federal Union of European Nationalities (2014), Linguistic diversity and multilingualism in Europe, p. 9 f. Available on www.fuen.org.

²Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: A New Framework Strategy for Multilingualism COM(2005) 596 final (22.11.2005).

³For a detailed analysis, see Gazzola (2006), p. 393 f.

language that they fully understand. Limiting the official languages would therefore impair equality of rights.

A second group of criteria for multilingualism management choices relates to political issues, and more specifically to democratic participation and the equality of representatives in EU political life. If the EU tries to engage in communication in the most “inclusive” possible way, this is because this method is regarded as the most efficient in order to enable people’s participation in EU political life. Then, following the principle of the equality of political representatives, as well as of the equality of social, professional or other categories that these bodies and institutions represent, limitations in the use of languages need to be avoided, because they risk to reduce the political weight of parties who cannot discuss issues in the language that they prefer. A system of equal treatment of languages has therefore to be established.

Third, multilingualism management is related to cultural issues. Since the Treaty of Maastricht, the EU was given the power to act in the fields of culture and training in support of actions undertaken by Member States (Articles 151 and 149 of the former EC Treaty). In consequence, cultural diversity and the plurality of languages have been the object of greater attention and of protection and promotion efforts within the EU. Furthermore, given that cultural multiplicity, rather than cultural homogeneity, reigns within the EU, multilingual communication is a facet of the EU’s support to the linguistic and cultural diversity in the Member States.

3 Legal Bases for the Protection of Multilingualism

Multilingualism and linguistic diversity constitute fundamental principles of the EU. According to Article 3(3) of the Treaty on the European Union, the latter “shall respect its rich cultural and linguistic diversity, and shall ensure that Europe’s cultural heritage is safeguarded and enhanced”. In the same direction, Article 22 of the European Charter of Fundamental Rights holds that “the Union shall respect cultural, religious and linguistic diversity”.

The multilingualism regime covers EU legal texts as well as EU institutions. As far as legal texts are concerned, the Treaties (Article 55 TEU, Article 358 TFEU) provide that they must be written in all 24 official languages of the EU, “the texts in each of these languages being equally authentic”. According to Article 4 of the Council Regulation n° 1/1958, determining the languages to be used by the former European Economic Community, “regulations and other documents of general application shall be drafted in the official languages”.

However, this does not apply to individual acts: the Court of Justice (“ECJ”) has ruled that:

nor can the second paragraph of Article 248 of the Treaty, as amended by the Treaty of Amsterdam, or the Court’s case-law on the interpretation of Community law be relied on in support of a possible principle of equality of languages. Although equal account must be taken of all the authentic versions of a text when interpreting that text, that holds good only

in so far as such versions exist and are authentic. Consequently, even if an individual decision is published in the Official Journal of the European Union and is therefore translated into all the languages for the information of citizens, only the language used in the relevant procedure will be authentic and will be used to interpret that decision.⁴

Concerning the EU institutions, Article 342 TFEU (ex Article 290 TEC) holds that “the rules governing the languages of the institutions of the Union shall, without prejudice to the provisions contained in the Statute of the Court of Justice of the European Union, be determined by the Council, acting unanimously by means of regulations”. In 1958, the Council approved the above-mentioned Regulation n° 1, which is the text containing the basic provisions for the language regime of European institutions. At every enlargement and on request of the new Member States, the language regime has been extended since to new languages and the engagement of the EU towards multilingualism has been constantly confirmed.

4 Risks and Challenges Related to Multilingualism

There are currently 24 official languages within the EU and legislation must be written in all of them. This entails the mobilisation of important translation and interpretation services within the EU institutions and agencies. The multitude of languages provokes the multiplication of challenges and risks. But there are more concerns due to the linguistic variety in the EU than mere problems of logistic and organisational nature: each legal system within the EU has its own language of law, and, as a result, legal terminology, legal concepts and styles of legal discourse differ. The contrast in legal language and culture is particularly pronounced between legal orders belonging to the common law and to the romano-germanic legal families.

Consequently, in such a multilingual environment arise important questions of equality, transparency and legal certainty for EU citizens. Accessibility of legally binding acts generally requires their publication in an official journal or, in the case of jurisprudence, in law reports. It is also necessary that binding legal acts be sufficiently clear for the citizen, if needed with the assistance of a lawyer, and foreseeable in their effects. Accessibility and intelligibility of EU law cannot be achieved unless every citizen can be provided with the texts in a language they understand.

The harmonisation, the effectiveness and the quality of EU law are also at stake in a multilingual environment. Harmonisation of national laws, which is a key element of the European integration process, can only be achieved if the EU legislation is applied in the same way in the different national legal systems. Many of the challenges in ensuring a harmonised application of EU legislation are therefore connected to issues of legal language. Tolerance of a certain degree of divergence is inherent to the integration process. However, where divergence is caused not by conscious decisions by the EU and the Member States but by differences in legal language, then divergence becomes less defensible.

⁴Case C-361/01 P *Christina Kik v. OHIM*, ECLI:EU:C:2003:434 para. 87.

5 Managing Multilingualism in the Functioning of EU Institutions

It is interesting to note that, among other international organisations active on the European continent, the Council of Europe and the Organisation for Economic Co-operation and Development work on a bilingual basis (English and French), while the Organisation for Security and Co-operation in Europe applies a system of limited multilingualism (its official languages being English, French, German, Italian, Russian and Spanish). Concerning the EU, language management is based, as already stated, on a delicate balance of legal, political and cultural criteria, which has led to the rejection of both radical models of monolingualism, i.e. the use of a single official and working language such as English, and of nationalisation, i.e. the transfer to the Member States of the whole financial responsibility and workload of translation and interpretation of EU texts.

Intermediate solutions appear in fact as more apt to suit the need for balance of interests and for effectiveness within the EU. Consequently, the language management models applied are mostly those of reduced multilingualism, which means the use of only some working languages within the EU institutions and bodies such as the European Commission, the Court of Auditors, the European Central Bank and, to a lesser extent, in the European Court of Justice, and of controlled multilingualism, particularly within the European Parliament, the Economic and Social Committee, the Committee of the Regions. This second model basically aims at ensuring that all members of the institutions concerned, representing respectively the populations of Member States, the forces of European economic and social life and regional and local authorities within the Union have the right to communicate in the language that they prefer. However, and in contrast to pure multilingualism, the controlled multilingualism model is based on the adoption of systematic management correctives, such as the use of pivot languages, the remote interpretation or the use of external freelance linguistic services.⁵

It is necessary to stress that there is a *de facto* distinction between official and working languages, although no such difference is made in Regulation n° 1/58. “Official languages” of the EU are generally defined as those used in communication between institutions and the outside world, and “working languages” of the EU as those used between institutions, within institutions and during internal meetings organised by the institutions. While the EU tries to adopt full multilingual communication in the 24 official languages concerning its relations with citizens and the Member States, communication in its internal activities are managed variably, depending on different articulations practiced in the choice and use of working languages.

Also, although Article 6 of Regulation n° 1/58 authorises a certain degree of flexibility regarding the use of languages for internal activities, providing that “the institutions of the Community may stipulate in their rules of procedure which of the

⁵For further information, see Gazzola (2006), p. 402 f.

languages are to be used in specific cases”, there are no rules stating specifically which languages may be used as working languages. Hence, the choice of working languages is just a matter of practice and no language can *a priori* be excluded from being chosen – nor could it legally be, as the Regulation makes no difference between official and working languages. For instance, English, French and German are not the “official” working languages of the Commission, but just the most commonly used languages for its internal activities, even though German is used far less than the other two. As for the Council, the equal treatment of the 24 official languages is largely respected for meetings of national ministers, as well as for meetings of the European Council, whereas fewer working languages are used in meetings of Committee of Permanent Representatives (“Coreper”) and certain preparatory groups.

Language management within the European Court of Justice is of particular importance, as it is related to the conditions of production of EU case law given that there are 24 potential languages of procedure for actions before the Court. Article 29(5) of the Rules of Procedure of the ECJ states that “the President of the Court and the Presidents of Chambers in conducting oral proceedings, the Judge Rapporteur in his preliminary report, Judges and Advocates General in putting questions and Advocates General in delivering their opinions may use one of the [official languages] other than the language of the case”. In practice, however, the language used is mainly French and sometimes English, but during all stages of drafting, discussion and deliberation of judgments constant consideration is taken of the document’s subsequent translation needs.

6 Managing Multilingualism in EU Law Production and Application

As European integration largely depends on the effective harmonisation of national laws in fields of EU competence, it is obvious that any legal language differences observed between the Member States risk to create divergence in the way that European rules are understood and applied in the national legal systems, thus affecting the harmonisation process. Harmonisation of national laws is mainly achieved by means of secondary legislation: regulations and directives. While transposition into national law is normally not needed for regulations, directives, which are only binding as to the result, must be transposed by each Member State through national implementing legislation. The process of transposition enlarges the risk of linguistic and semantic divergence that is already inherent to the drafting of EU legislative texts and their translation into all official languages of the Union.

In this respect, it is useful to recall that proposals for directives are initially drafted by the Commission either in English or, less frequently, in French and the initial draft is translated into all official languages to allow for reactions from governments, national parliaments and interested parties and bodies. When the text

comes to be debated in the Council of the EU, the discussions are based on one reference text, either the English or the French version. The amended text is then again translated into all the official languages for debate in the European Parliament. Following their adoption, directives are translated into all twenty-three other official languages, each language version having equal status. Each language version must produce the same effects in law, the text thus constituting a “*multilingual expression of a single message*”.⁶

7 Problems of Semantic Divergence

Despite the expertise of translators and legal revisers in their task of ensuring coherence between the different language versions of EU legislation, problems of semantic divergence still arise. The absence of equivalence of legal terms in the respective legal languages of the Member States, as well as semantic divergences produced on the occasion of translation and transposition of legal texts, makes it difficult to ensure a common and uniform meaning of EU legislation through the EU.⁷

First of all, differences in the way the same legal terms are perceived in the Member States can stem from differences in legal principles, institutions and reasoning in each national legal order. As previously said, there is particularly high potential for semantic divergences between national legal systems belonging to common law and romano-germanic traditions. The risk of semantic divergence increases when the term in question expresses a concept not known in some legal systems (for example, the principle of “*good faith*” used in the Unfair Contract Terms Directive is widely known in romano-germanic legal systems but accepted with difficulty in English law). Then, divergence can be created during the process of translation itself, even when there is in principle no problem of legal equivalence, while, finally, the transposition of directives into national law can be the source of further divergence.

8 Why Not Reduce Multilingualism in the EU?

Because of these semantic divergence risks it has been argued that the legislative multilingualism in the EU is self-defeating and even risks to be incompatible with the rule of law requirements of accessibility of law and ability to foresee its effects, as developed by the European Court of Human Rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms.⁸

⁶Ajani and Rossi (2006), p. 84.

⁷For extensive analysis and examples on semantic divergence, see Taylor (2011), p. 105 f.

⁸Schilling (2010), p. 48.

There is in fact a recurrent debate on the perspective of limiting multilingualism within the EU and proposals are formulated once in a while in favour of surrendering to simpler solutions, and of taking into account the *de facto* dominant position of the English language in the European and international business world. The reasons advanced for reducing multilingualism within the EU are twofold: budgetary and organisational arguments are usually added to the above mentioned risks related to semantic divergences in the different linguistic versions of EU law.

However, proposals for reducing multilingual practices within the EU seem unlikely to prevail, at least for the time being, considering first of all the Member States' particular political sensibility in regard to this matter. Moreover, the argument related to the budgetary impact of translation services is not particularly convincing. According to rough estimates of the Commission's DG Translation, the cost of all language services in all EU institutions amounts to less than 1% of the annual general budget of the EU, which, divided by the population of the EU, comes to around 2 euros per citizen per year.⁹

But most importantly, far from endangering the rule of law as argued by some authors, the option to maintain multilingualism is motivated precisely by the necessity to ensure the rule of law within the Member States. Given that an impressive volume of legal acts (estimated at almost 80% of the legislation in total) that the national administrative and judicial authorities are called upon to apply is nowadays of European origin, it is essential that all EU legislative acts and EU case law continue to receive 24 official linguistic versions, in order that the national authorities preserve the possibility to use and apply the respective versions of the same text. These official linguistic versions should ideally continue to be provided by the EU translation services, which have developed a high degree of expertise and internal coordination in their field, rather than by the Member States themselves.

Maintaining EU multilingualism is, in consequence, crucial to ensure effective implementation of the EU law across Europe. In any case, several methods for minimising semantic divergences in the different linguistic versions of EU law have been developed.

9 Methods for Minimising Semantic Divergence

In order to minimise semantic divergence that may occur during the drafting of EU legislation and in a general spirit of linguistic coordination,¹⁰ EU institutions apply constant controls of the consistency and coherence of the different linguistic versions of EU legislative acts. Controls culminate at the end of the legislative process, with the editing and finalisation of legal texts by legal and linguistic experts. Meanwhile, the EU legislative language itself has been to a large extent standardised, not only through the work of EU translation services but also through the

⁹ Guilloud-Colliat (2014), p. 1362.

¹⁰ On this question, see Taylor (2011), p. 114 f.

jurisprudence of the ECJ. Recurrent and autonomous concepts of EU law have thus acquired a proper Union-wide meaning and, consequently, equal effect in all Member States. Moreover, in order to ensure that European legislation is clear and unambiguous, the EU legislator frequently provides definitions for the terms used, a technique that has been borrowed from common law systems. Directives can thus contain whole definition sections (for example, the Environmental Liability Directive or the Product Liability Directive), while they also include preambles which set out the reasons for the legislation and its objectives and offer guidance to national judges in their interpretation of the EU texts.

The role of the ECJ in ensuring the uniform application of EU law is also significant. The Court accepts that “all the language versions must, in principle, be recognized as having the same weight and this cannot vary according to the size of the population of the member State using the language in question”¹¹ and bears in mind that, the European legislation being drafted in several languages, “an interpretation of a provision of Community law ... involves a comparison of the different language versions”.¹² At the same time, the Court underlines that “the object of ensuring that in all circumstances the law is the same in all States of the Community” must be respected and that the aim is “to avoid divergences in the interpretation of Community law which the national courts have to apply”.¹³ The clear preference for a uniform interpretation of Union law makes it, according to the ECJ, “impossible for a passage to be considered in isolation and requires that it should be interpreted and applied in the light of the versions existing in the other official languages”.¹⁴

When the ECJ is asked to provide an interpretation of a term but is faced with differences in the various language versions of the legislative text, it proceeds to a comparison of the distinct language versions in order to decide which one bears the correct meaning. In some cases, the Court will favour the language version of the text which is clearer. Also, when one language version leads to doubt, the Court often considers the semantic similarity of the other versions as significant. However, the most important factor for the Court is the aim or purpose of the legislation, and the linguistic version of the provision is considered as valid where it is perceived as corresponding to this aim. As the Court points out, “the different language versions of a Community text must be given a uniform interpretation and hence, in the case of divergence between the language versions, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms a part”.¹⁵

¹¹ Case C-296/95 *The Queen v Commissioners of Customs and Excise, ex parte EMU Tabac and Others*, ECLI:EU:C:1998:152, para. 36.

¹² Case 283/81 *CILFIT v Ministero della Sanità*, ECLI:EU:C:1982:335, p. 18.

¹³ Case 166/73 *Rheinmühlen Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ECLI:EU:C:1974:3, p. 2.

¹⁴ Case 9/79 *Koschniske v Raad van Arbeid*, ECLI:EU:C:1979:201, p. 6.

¹⁵ Case 30/77 *Regina v Bouchereau*, ECLI:EU:C:1977:172, p. 14, and case C-372/88, *Milk Marketing Board v Cricket St Thomas*, ECLI:EU:C:1990:140, p. 19.

10 Conclusion: Why Multilingualism?

Multilingualism in the sense of a multilingual environment was previously examined rather as a source of challenges or obstacles to European integration. In this context, individual multilingualism, i.e. in the sense of an individual's knowledge of many languages, can be an asset of the outmost importance, both for scientific and for practical reasons.

Only one linguistic version of EU legislation can be misleading; nowadays, one has to be able to compare and understand other versions too. This capacity is important for every legal actor, including judges, and in particular national judges and lawyers practicing before national courts. As stated before, the ECJ can only be effective in assuring the uniform interpretation of EU law if the national courts correctly identify and refer questions on linguistic divergence to it. The national judges must therefore be able to examine more than one linguistic versions of the EU legal act in question. This cross-examination is necessary in order for the judge to be aware of the eventual uncertainty of meaning of the text, but this uncertainty will not be apparent if the judge relies exclusively on one national language version which appears in itself clear.

Knowing only one foreign language is not sufficient for those who aspire to work for the EU institutions either. Knowledge of at least two official languages other than one's mother tongue is normally required. Even if there is a strong tendency towards the English language as the common language of our time, nobody should underestimate the importance of multilingualism as a decisive advantage for professional careers. English has become a condition for every academic post, a condition comparable to technical skills as typing; it is not a distinctive element anymore. Legal scholars should at least read and use other languages than English.

In particular, for those who study EU law, I would suggest French and German and, why not, also Italian and Spanish, which correspond to the most important legal orders in the EU. These five languages are widely recognised as pivot languages in the Union. In any case, French and German seem to me necessary for acquiring access to the contributions of French and German authors as well as to the case-law of French and German courts. Imagine the advantage consisting in the capacity to study and use French and German literature and jurisprudence. Every time we read in the newspaper that the German Constitutional Court or the French Council of State gave significant decisions in different fields, we understand how valuable would it be if we had direct access to these judgments. As for the Court of Justice, it is common knowledge that being fluent in French and English is a condition for a job; also speaking German is a real asset, taking into account that a very big number of preliminary rulings stem from German courts.

It is a fact that the younger we start with foreign languages the easier we learn them. However, it is never too late, even for more mature people. It is no secret that the judges arriving at the Court of Justice are not always fluent in French – I was myself far from being fluent in French when I joined the Court in 1999. I was

therefore obliged to improve my French significantly, which I did, just as my colleagues also did and continue to do.

So, if I can send a message which could be of a certain value for young legal scholars, I would say: learn languages!

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Judicial Reasoning in a Multinational Court



Bo Vesterdorf

1 Introduction

In this short “non-doctrinal” contribution to the Festschrift in honour of Carl Baudenbacher following his resignation as President of the EFTA Court, I shall discuss the intricacies of deliberating in a legal forum consisting of judges from all Member States of the European Union. I shall discuss a number of points on the basis of my own personal experiences as a former judge and President of the Court of First Instance (now the General Court, the “GC”). I shall discuss how the multinational nature of the EU Courts (the Court of Justice and the GC) influences judicial deliberation and reasoning of judgments. This contribution is not meant to be an academic discussion but simply some personal reflections on the issues mentioned.

2 Composition of Chambers: Ensuring Diversity of Nationality and Legal Tradition

As is probably well known to the readers of this Festschrift, both the Court of Justice and the GC of the European Union decide all their cases in chambers consisting of at least three judges,¹ many of them in chambers of five or more judges and some – the most important ones – in what is called the Grand Chamber, which consists of at least 13 judges.

Former President of the Court of First Instance of the European Communities.

¹The possibility for the GC to decide certain cases by a single judge is in practice almost never used.

B. Vesterdorf (✉)
Holte, Denmark

Until 2015, both the Court of Justice and the GC were composed of one judge from each Member State.² This meant that each chamber of the courts would be composed of three, five or more judges, each from a different Member State. Since 2015, the GC has been composed of two judges from each Member State³ and nothing, in principle, would prevent a chamber from having two judges of the same nationality. It is neither prescribed in the Treaty of the functioning of the Union, nor in the Statute of the Court of Justice or the Rules of procedure of the GC that judges in a chamber must be of different nationalities.⁴ There is, however, at least in my mind, no doubt that the President of the GC when deciding the composition of the chambers,⁵ will make sure that no chamber⁶ sits with more than one judge from any single Member State.⁷ Furthermore, it has always been the practice of both Courts to ensure that various national legal cultures are represented in each chamber to avoid the predominance of a particular legal culture. In practice, one would therefore not see a chamber composed of a Swedish, a Danish, and a Finnish judge, nor a chamber composed of a French, a Belgian, and a Luxembourgish judge.

3 Language Issues: The Working Language of the Courts

This multi-national composition of the two Courts has often led national judges visiting the Courts to pose questions such as “how is it?”, or “is it not difficult to agree with judges from other Member States with other legal systems and on top of that, speaking another language to one’s own?”

When I was appointed to the Court of First Instance on its establishment in 1989, I did indeed ask myself such questions and was obviously very curious to see how it was going to work, both with regard to the language question and to how we would work together to decide the cases before us.

²Plus at the Court of Justice a number of advocates general, presently 11.

³The extra judges are being appointed to the GC gradually between 2015 and 2019.

⁴Nor is it prescribed anywhere in the rules, as it is at the European Court of Human Rights, that a judge of the nationality of the Member State from which the case comes must be a member of the deciding chamber. For a number of years that was, however, the practice of the Court of Justice. The Court of Justice, however, in practice never appoints the judge, whose country the case concerns specifically, as judge rapporteur.

⁵Formally the decision regarding composition of the chambers is taken by the Court sitting in a plenary session. However, since the establishment of the Court it has been a rule that in practice it is the President who decides on the composition. This avoids any possible dispute between the members of the Court regarding who sits with whom in a chamber.

⁶This is also apparent from the present composition of the nine chambers of the GC.

⁷It may, however, happen occasionally when a judge in a chamber needs to be replaced by a judge from another chamber and in cases brought before the grand chamber.

4 Multinational Composition of the Courts: “How Is it?”

The answer to the first question regarding language was, however, quickly clarified, as I did in fact already know from my time (beginning of 1974 to mid-1975) working as a translator in the Danish language section at the Court of Justice that the working language of the then single Court and now two Courts was, and probably always will remain, French. In other words, the two Courts have only one working language, and therefore differ to the European Court of Human Rights where there are two working languages; English and French.

The one-language regime at the two Courts presents certain advantages and some disadvantages.

The first clear advantage is that it considerably simplifies practical life at the Courts. All internal written and oral communication is in French. Therefore, there is no need for translation of internal communication, nor the need for interpreters to be present at internal meetings between judges or other personnel.⁸ Another important advantage is that the EU law system – since the establishment of the Court of Justice in 1952, not long after the Second World War – has been inspired by the French Code Civil legal system, probably because of the simple fact that out of the original six judges from the then six Member States, three came from countries with essentially the same legal system. French was also the language in which the original Treaties were drawn up and the language chosen as the working language by the first judges of the Court. Since then, administration and court work has been conducted in French. Finally, having only one working language is an important element in ensuring coherence of the case law. The reason is that quite a number of legal concepts, despite the same name, do not necessarily cover the same legal situation in each language.

However, the working language also presents important problems in practice – not least for Member States searching for suitable candidates to appoint to the Courts and even more so for new judges from non French-speaking Member States. Regarding the search for suitable candidates, the problem is not that a condition exists that candidates can only be appointed if they master French, because this is not the case. Nevertheless, there is no doubt that potential candidates know that they are expected to be able to work in French, both orally and in writing, if appointed to the Courts. There can also be little doubt that this expectation may deter otherwise

⁸It has sometimes been suggested that the Courts should allow oral deliberations in another language chosen by the deliberating judges. This has, in fact, been done in practice over the years from time to time when all members of the chamber accepted such a suggestion. From my time, I remember one specific case which it was decided to treat under the accelerated procedure. The language of the case was English and the three judges of the case dealt with the case in English all the way, both in writing and in oral deliberations. At the Court of Justice it has happened in a number of cases, at least during the presidency of former President Ole Due. I am informed that the Court of Auditors of the European Union in a report on the institution the Court of Justice has recommended that the Courts consider the possibilities of introducing more than one working language. I would personally advise against that.

well-qualified candidates from seeking appointment. It is a fact of life that nowadays and for many years, people from non French-speaking countries are taught English as a second language rather than French. Starting to learn French at the age of the potential candidates to a post as judge in the Courts is quite a challenge, the result of which I have encountered more than once during my 18 years in the Court. Indeed, quite a few of newly appointed judges from non French-speaking Member States have, at least for some time, had problems with their new working language, not least when having to orally explain their position on this or that legal issue. Indeed, I sometimes had problems myself when starting out at the Court. It was therefore with some degree of anxiety that at least I (and probably some of my colleagues) at the beginning of 2004 awaited the arrival of the ten new judges from the former Eastern bloc countries. Would they readily accept our working language? Would they be able to work in that language? Luckily it turned out that all of them without question accepted the challenge and those of them who felt it necessary, or at least useful, undertook intensive lessons in French. Although it is nonetheless clear that this was a challenge for many, it is also clear that they succeeded in meeting this challenge.

5 Judicial Reasoning: Reconciling Different Styles of Reasoning Traditions and Ensuring a Clear Framework of Reasoning

Before I turn to the question of the difference in the legal backgrounds of the judges and the problems that this may, at least occasionally, give rise to, let me explain a bit about the judicial reasoning of the Courts.

It is of course, or at least should be, a cornerstone of any court in countries governed by the rule of law that, in their judgments, courts explain how and why they have reached their conclusions. A well-reasoned judgment serves several purposes: it may help the addressee of the judgment to understand and perhaps accept a negative outcome of the case; it enables the addressee to make a more qualified decision on whether to appeal; in the case of appeal, it provides the appeal judges with the reasons as to how the lower court reached its conclusion in the appealed judgment, and, finally, well-reasoned judgments are important for the general acceptance and legitimacy of the rulings of the courts. Furthermore, judges will find it more difficult to find legally convincing reasons for a bad judgment than for a good judgment. The need to provide reasons may therefore be a useful tool to encourage them, on occasion, to reconsider their positions and this may help to strengthen the quality of the judgments. As regards the two EU Courts, the legal basis for the obligation to state reasons for the judgments is found in Article 36 of the Statute of the Court of Justice of the European Union. It simply reads: “Judgments shall state the reasons on which

they are based...” This very short rule leaves the Courts considerable freedom to decide the extent and detail of the reasoning they must give in their judgments.⁹

To what extent and how carefully judges explain their reasoning differs from Member State to Member State. Judgments from French courts were traditionally only very briefly reasoned, if, in reality, at all. The opposite applies to German judgments which normally contain a very detailed and complete explanation of the reasoning of the judges. In my own country, Denmark, judgments (in particular judgments of the Supreme Court) for many years tended to give very little, if any, explanation of the reasoning beyond “in view of all the circumstances of the case the Court finds...” Fortunately, this has changed considerably in recent decades. Regarding the Court of Justice, up through the eighties and nineties many lawyers and scholars complained that they often were at pains to understand why and how the Court of Justice had arrived at the judgment in question. In other words, they complained that the reasoning of judgments was sometimes inadequate.¹⁰

6 The General Court’s Style of Reasoning

When in 1989 the new Court, the Court of First Instance, was set up, it was clear to the 12 new judges that, *first*, they would have to meet the expectations of carrying out a much more thorough examination of the cases brought before it because the Court of Justice had been criticised for not going into sufficient depth, in particular regarding the often complex and heavy competition law cases. *Second*, the new judges agreed that they would need to furnish much more detailed reasoning for their judgments, not least because they could be appealed to the Court of Justice on points of law. It would not be wise to have a judgment quashed because of insufficient reasoning. There was agreement among the new judges that judgments should be so well-reasoned that the addressees would be able to make a qualified decision on whether to appeal and be sufficiently well-reasoned for the appeal court to understand the conclusions of the judgment under appeal.

The reasoning part of the judgments of the two Courts normally builds on a three-step explanation. *First*, a careful explanation of the facts taken into consideration and, particularly with regards to the GC, the evidence upon which the judgment is based; *second*, an explanation of the legal basis (articles of the Treaty or secondary law), interpretation of the applicable law and, almost always, references to earlier case law; *third*, an explanation of the application of the law to the facts, to the pleas in law and the various arguments of the parties to the case and; finally, the conclusion drawn from the application of the law and thereby the result of the judgment.

⁹Article 87 in the Rules of Procedure of the Court of Justice and Article 117 in the Rules of Procedure of the GC only provide that judgments, in addition to indicating the formalities of the case, must give a summary of the facts and explain the grounds for the decision.

¹⁰See for example Oppermann (1991), p. 234.

It should be mentioned that the *stare decisis* principle known in some legal orders does not apply to the two EU Courts, which means that the GC is not formally bound by its own earlier case law or by earlier case law from the Court of Justice, just as the Court of Justice is not bound by earlier case law. The GC is, however, obviously bound by the findings of the Court of Justice in an appeal judgment if the case is sent back to the GC. The fact that the *stare decisis* principle does not formally apply does not, however, mean that earlier case law does not count. The GC always carefully examines its own earlier case law and more importantly, the case law of the Court of Justice, either for guidance or inspiration.¹¹ It would indeed be very unwise and, I think, even constitutionally unacceptable for the GC to disregard the earlier case law of the Court of Justice unless it can argue very convincingly why, from a legal standpoint, such earlier case law should be disregarded or alternatively, that there are sufficient reasons to distinguish the new case from the earlier case law.¹² This kind of indirect acceptance of the *stare decisis* principle becomes very clear when reading judgments from the GC and the Court of Justice which almost invariably clearly build and rely upon earlier case law. Only on very few occasions has the Court of Justice clearly and explicitly overruled earlier, well-established case law.¹³ Building upon and relying upon earlier case law is finally highly important to ensure prevision and coherence.

7 Insufficient Reasoning or Errors in the Reasoning: Different Perceptions

Returning to the question of how judicial reasoning works in practice in a Court composed of judges from a large number of different legal orders and systems, I would first mention a peculiar difference of perception which has appeared in quite a number of cases in practice. It concerns what is meant by “insufficient reasoning”.

¹¹ The GC would possibly also have regard to judgments of the EFTA Court in comparable cases. Furthermore, judgments of the European Court of Human Rights may serve as guidance in cases regarding fundamental rights as now set down in the Charter of Fundamental Rights of the European Union.

¹² In its judgment in Case T-173/98, *Union de Pequenos Agricultores v. Council*, EU:T:1999:296, the Court of First Instance openly challenged earlier and rather strict case law from the Court of Justice regarding the interpretation of the admissibility for individuals to challenge certain acts of the EU institutions. This judgment was on appeal quashed by the Court of Justice, see judgment in Case C-50/00 P, EU:C:2002:462. Another example is the judgment by the GC in the *Assi-Domän* case (T-227/95, EU:T:1997:108) which was also quashed by the Court of Justice on appeal (C-310/97 P, EU:C:1999:407).

¹³ A clear example of this is the judgment of the Court of Justice in Joined Cases C-267/91 and C-268/91, *Keck and Mithouard*, EU:C:1993:905, in which the Court explicitly stated in para 16 “By contrast, contrary to what has previously been decided...”

In this regard, it should be noted that the requirement of judicial reasoning of a judgment is a requirement of a formal character. Reasons for a judgment must be given in the judgment.

The first time I was confronted by this difference of perception during my time at the Court, was in a case in which the Judge Rapporteur in his draft for the judgment proposed to annul a Decision by the Commission because of an alleged lack of reasoning, i.e. a violation of Article 296 TFEU. However, upon closer examination it appeared that what the Judge Rapporteur considered to be a lack of reasoning was, in reality, not a lack of or insufficient reasoning, but rather the effect of the Judge Rapporteur not agreeing with the reasoning stated in the Decision. Let me illustrate the difference by reference to some examples:

- In the reasoning part of a judgment, it is indicated that certain facts have been established by the court. If the appeal court disagrees and therefore finds insufficient proof of the claimed facts, it does not mean that reasoning was not given but rather, that the appeal court disagrees on the substance.
- If in the reasoning part of a judgment, a certain interpretation of a specific article of law is indicated as the legal basis for the judgment and the appeal court disagrees, there is no lack of reasoning but just disagreement on the substance.
- If a judgment does not contain any explanation as to why a certain plea in law has been rejected by the court, this constitutes a lack of reasoning and therefore a violation of the duty to state reasons. This would normally lead to the annulment of the judgment, unless other pleas in law lead to the same result in the case.
- If in a judgment a final plea is rejected as inadmissible “for the reasons stated above” and the reasoning above concerns several different pleas, the judgment is insufficiently reasoned as regards the final plea because it is unclear which of the above reasons reference is made to.

This kind of confusion between the formal requirement of reasoning and the substance has indeed, not infrequently, given rise to intense discussions during deliberations. It was striking that for some of my southern colleagues this necessary distinction between formal reasoning and substance seemed to be a problem. It is however important for judges to keep this distinction in mind. Annuling a Decision for real lack of reasoning just means that reasons must be stated clearly in a new Decision – and the same applies in principle to judgments. Annuling a Decision or a judgment on substantive grounds means that a new Decision or new judgment needs to be based on better substantive arguments.

8 The Deliberations Amongst the Judges: Differences Between the General Court and the Court of Justice – Risk of Inconsistency Amongst Chambers and Policy Questions

I have often been asked by national judges and lawyers if it has been difficult to agree with judges from other countries on the outcome of a case before the Court. Sometimes to their surprise, my answer to this question has been that in general, it has not – and this has been the case since the start of my time at the Court. In practice, it was not much more difficult than during my experience of being a judge in my own country. One interesting difference was that even if the judges in the chamber more often than not agreed upon the conclusion, they would sometimes arrive at that conclusion following different – sometimes very different – paths; some much longer, more complex and occasionally a bit more obscure than others. In such cases, it was quite a relief to find that the end result was the same. In such cases, the main problem would be to agree upon the statement of reasons which sometimes became rather difficult. In practice, this would often lead the judges to try to compromise, often simply by striking out parts on which agreement was difficult to obtain. The reasoning of judgments from the Courts has not infrequently in the past been (and this is still sometimes the case) criticised by practitioners for being unclear, which may in fact be precisely the result of disagreement and subsequent compromise about the formulation of the reasoning. Another problem which sometimes appeared was the unfortunate consequence of the fact that some legal notions, though bearing the same name, did not mean exactly, or did not at all mean, the same thing in the legal systems of different Member States. This sometimes led to confusion during deliberations until such time that new judges to the Court learned the exact meaning in French of the legal notions in question.

Some have argued that the statement of reasons in judgments by either of the Courts might well be much clearer and more detailed if the Courts, instead of trying to find a compromise regarding the statement of reasons in cases where there is a lack of consensus, would allow dissenting opinions; thus avoiding the need to compromise on the formulation of reasons. This would be of particular interest in judgments from the GC when it comes to the decision of whether to appeal a judgment of that Court. Although this may well be correct, it is not likely to become a reality because of the many disadvantages, of both a legal and practical character, that this would present.¹⁴

The deliberation phase during which judges seek to agree upon the solution to the case differs between the two Courts. In his contribution to the *Liber Amicorum*, mentioned in footnote 14,¹⁵ the former judge at the Court of Justice, Dr. Ulrich Everling, gave a very interesting description of the deliberations at the Court of Justice. It would go too far to resume his description here, but in the following

¹⁴ For a discussion of these issues, see Edward (1994).

¹⁵ Ibid, see pages 47–50.

paragraph of this contribution the explanation I shall give of the deliberation phase at the GC will indirectly also illustrate the deliberation phase at the Court of Justice.

The deliberations at the GC differ to those of the Court of Justice for several reasons. *First*, because the GC, in contrast to the Court of Justice, does not benefit from an Opinion from an Advocate General.¹⁶ The GC is in principle free to appoint Advocates General but has not done so in practice since the very first years of its existence.¹⁷ This is, of course, not because the GC is opposed in principle to the idea of having an Advocate General examine the case and express his Opinion on it. However, one reason is that it takes too much time and would thus prolong the already lengthy period of time that it takes to decide cases before the GC. It is also due to the fact that the GC, in most cases, is able to base its decisions on existing case law from the Court of Justice. *Second*, because of the absence of an Advocate General (and the waiting period for his Opinion), the GC begins to deliberate immediately after the oral hearing.¹⁸ This has the advantage that all the judges in the chamber do not have to read the case files again after the oral hearing and before a later deliberation. They can start deliberating while the case and arguments are fresh in their minds. At the Court of Justice, the judges cannot proceed to deliberations immediately after the oral hearing because in most cases,¹⁹ they must await the Opinion of the Advocate General which may take several weeks. Once the Opinion is delivered, judges of the chamber will have to go back to the case and read the case file again to be ready for deliberations which, also contrary to normal practice at the GC, often take the form of written contributions discussing various issues of the case.

At the GC, the President of the Chamber will invite the Judge Rapporteur to present his/her position regarding the individual issues, disputed facts, evidence, points of law to be decided and view of how the case should therefore be decided. After that, the other members of the chamber will express their views and this normally leads to discussions on several points. If at the end the President finds that there is consensus regarding the result, the Judge Rapporteur will be asked to prepare a draft judgment on that basis. If no consensus can be found, the majority view will of course be decisive and the Judge Rapporteur must prepare a draft on that basis, even if he might disagree and thus be in the minority. Once a draft has been presented to the chamber, the second or maybe third round of deliberations will begin, during which the reasoning will be discussed in more detail, in principle page by page. During this deliberation, members of the chamber may suggest modifications,

¹⁶Contrary to the first more than 40 years the Court of Justice does not any more appoint an Advocate General to assist it in cases in which the Court finds that no new points of law have been raised.

¹⁷During the first 3 years, the GC appointed an advocate general in four cases in total.

¹⁸Since 2015 the GC may decide the case without an oral hearing, unless one of the parties to the case requests a hearing or if the Court finds an oral hearing necessary. In cases without oral hearing the chamber will start deliberations once the written procedure is finished.

¹⁹In a number of less important cases or cases in which there is a well-established line of case law the Court of Justice may decide the case without an Opinion from the Advocate General.

additions, deletions or even ask for a new draft as the case may be. The draft, or new drafts, may be discussed in detail during several rounds of deliberations. The wording of the reasoning provided by the GC in its judgments to a large extent follows the tradition of the Court of Justice. This is the case despite the fact that the judgments of the GC, and importantly the reasoning in particular, tend to be longer, sometimes much longer, than those of the Court of Justice. This is in part due to the fact that the GC decides direct cases, many of which are very fact heavy and complex.²⁰

Third, whereas at the Court of Justice discussions during the deliberations will often turn on judicial policy questions and the larger and more general points of law or institutional policies (often generated by discussion of such wider issues by the Advocates General in their Opinions), such discussions rarely took place, and probably still rarely take place, at the GC. The GC normally, or at least very often, has sufficient guidance from, and will follow, the case law of the Court of Justice. Furthermore, the GC, as explained above, does not benefit from the assistance of Advocates General who may, and often would, raise such issues in their Opinions. To remedy the lack of these kind of discussions among the judges, during my presidency I often had notes prepared on wider legal issues which were to be discussed among the judges outside the framework of individual cases. In such papers, we would examine existing case law, if any, on the issues in question, discuss that case law and try to gain useful insight from the discussions.²¹

9 Ensuring Coherence of the Case Law

In the GC, which now sits in nine chambers – most often sitting with only three judges,²² all of which having to decide the same type of cases without any formal coordination between the chambers²³ – there is a risk of developing a degree of incoherence which may lead to legal uncertainty.²⁴ When this appears to happen,

²⁰ Dr. Ulrich Everling, quite rightly I think, described the way in which the Court of Justice states its reasoning as “*terse, almost epigrammatic*” as opposed to discursive and explanatory. Everling (1994).

²¹ I understand that some kind of similar general discussions still take place at the GC.

²² Since the gradual arrival of two judges from each Member State it appears that many more cases are now being attributed to five-man chambers. In 2017 about 80 cases whereas in former years on average only about 10 cases a year were given to five-man chambers.

²³ At the Court of Justice, the weekly general meeting of all the Members, during which the Judge Rapporteurs present their preliminary reports of cases being prepared for oral hearings, allows for a certain degree of coordination.

²⁴ All judges at the two Courts are assisted by legal assistants (the *referendaires*). They will, as part of their valuable assistance, be tasked with examining existing case law, advising their judge about the possible risks of contradicting previous decisions, and perhaps how to avoid such an outcome. Another important form of assistance in this regard is provided by the so-called *lecteurs d'arrêt*. One of the important tasks of the so-called *lecteur d'arrêt* is to draw the attention of the Judge

appeal to the Court of Justice is the natural remedy, but it would evidently be better to avoid such problems. One remedy to avoid this would be for the GC to examine its own case law from time to time over a certain period to see if there are problems that the judges need to be aware of. This would also be useful from another perspective i.e. the regular arrival of new judges following retirements or non-renewal of the mandate of judges. In this regard it is interesting to note that the GC, after the post as Vice-President was created at the GC, has charged the Vice-President with the task of developing legal analysis of the Court's case law with a view to ensure coherence, serve as assistance in pending cases, highlight different areas of problems and share general knowledge. This could well serve as a very useful tool for the different chambers when deliberating.

10 Courts Enriched by Judges from a Diverse Professional Background

Let me conclude this small contribution with some more personal comments following eighteen years of deliberation and day-to-day co-existence on the Court with judges from the other Member States.

I think that most of my former colleagues, and probably most or many of the present judges at both the Court of Justice and the GC, would agree with me that it is an advantage for the Courts that their members come from different types of former professional activity, including former judges, former professors of law, former practising lawyers or former high ranking civil servants. This means that cases will be discussed on the basis of input seen from different angles, from a professional judge's view, from a more academic point of view, from a more practically-minded point of view or from a more administrative point of view. This enriches the discussion, and hopefully makes for a better judgment. Are there disadvantages to this? It may, indeed, sometimes complicate the deliberations unnecessarily, in particular if the deliberations turn into an academic exercise or if it appears, as has happened, that a member of the chamber seems to have forgotten that he/she is not there to defend national or other specific interests. Furthermore, for judges who come from either academia or national administrative posts, it appears to be difficult sometimes to understand that they are only there to decide upon the claims presented by the applicant or the questions posed by a national judge and by the various pleas in law entered by the parties to the case, and nothing more. On the other hand, for judges coming from, for example, the Scandinavian countries, it will be a surprise to see the extent by which the procedure before the EU courts differs from what they are

Rapporteur in a specific case to the risk of creating incoherence with former judgments or with a draft in a similar case from another chamber. Another important task of the *lecteurs d'arrêt*, who are all French-speaking lawyers, is to ensure linguistic quality (as pointed out above, French is the working language of the Courts). Translation into the other formal languages of the Courts is always done on the basis of the original French version of the judgment.

used to, in particular as regards the much more active role played by the EU judges during both the written and in particular, the oral phase of the procedure.

11 Concluding Remarks: The Court's Unlimited Jurisdiction

The EU courts have from time to time been criticised for not really using – or at least too rarely – their unlimited jurisdiction, though in most competition cases being asked by the applicant to do so. As I have sometimes said, judges should always ask themselves whether the result really renders justice or is just a legally correct and almost automatic answer, following sometimes very old case law established decades ago despite the fact that so much has changed since then. Is it, for example, also always justice to blindly follow the Commission's Guidelines on fines in competition cases when the circumstances of the individual cases often differ considerably from case to case? It is, of course, all well and right that guidelines can be useful and serve a certain purpose with regards to transparency and legal certainty, but they should never be considered by the judge as more than a guideline and should not stand in the way of the judge's individual and independent view of the seriousness of the case in view of all the circumstances. Particularly concerning fines, the Courts have full jurisdiction but in fact for many years seemed (and still seem) reluctant to really exercise it.²⁵ One of the few examples of real use of the unlimited jurisdiction during the nineties is the judgment by the Court of First Instance in case T-191/98, *Atlantic Container Line and others v. Commission*. In this judgment, the Court annulled fines imposed by the Commission for infringement of the competition rules finding, contrary to the Commission, that the circumstances of the case were such that no fine should be imposed.²⁶ Whereas the criticism of the reluctance may seem to be well-founded during the nineties, it is perhaps a little less well-founded when one analyses the case law of the GC in the more recent years.²⁷ This is to be saluted and the Courts should perhaps pay even a bit more attention to this aspect of its jurisdiction. It should not be forgotten that one basic

²⁵ The GC often refers to its full jurisdiction when it modifies a fine imposed in competition cases by the Commission, when in reality, in most cases such modifications are just automatic adjustments to the fine according to the Guidelines. This could come as a consequence of, for example, finding that an infringement did not last as long as alleged by the Commission. Formally seen, changing the sanction imposed is an exercise of unlimited jurisdiction but normally the modification just follows the Guidelines. However, should the GC find an infringement to not be as serious as alleged by the Commission and then set a lower fine without any regard to the Guidelines, the GC would be using its full jurisdiction not only formally but also really in that the Court has undertaken its own independent view of the seriousness of the case.

²⁶ The case was decided by a three-man chamber presided by the present President of the Court of Justice and one of the other members was the present President of the GC.

²⁷ See for example the GC judgment in Case T-11/06, *Romana Tobacchi v. Commission* EU:T:2011:560, Case T-462/07, *Galp* EU:T:2013:459, and Joined Cases T-56/09 and T-73/09, *Saint-Gobain France v. Commission* EU:T:2014:160.

feature common to all countries governed by the rule of law is that it is always left to the courts to determine not only guilt, but most importantly the sanction to be imposed in the specific circumstances of a case. It is generally recognised that sanctions cannot, without unwanted consequences, be determined precisely beforehand by legislators or by administrators because of the countless variations of circumstances governing individual cases.

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Is There an Art of Judicial Reasoning at the General Court? Some Modest Comments



Marc van der Woude

1 Introduction

The art of judicial reasoning is a serious and complex topic that has been the subject of numerous learned studies and commentaries. It is complex because it alludes to a wide range of disciplines: logic, hermeneutics, morality, and ethics. Seen from a wider perspective, it also relates to the sociology of law and, perhaps, the anthropology of the judicial profession.

As a distinguished academic and judge, Carl Baudenbacher would have deserved an in-depth and well-documented analysis of the art of judicial reasoning. Most probably, that analysis would have been contained in a study of 40 pages with numerous footnotes and accompanied by an exhaustive bibliography. Now, if a study of that nature had been a requirement to contribute to his *Festschrift*, I would not have been amongst the selected authors. Apart from the fact that I simply lack the necessary theoretical and academic background for such a study, my present schedule barely leaves time for extensive academic writing.

Fortunately, the organisers of Carl's *Festschrift* seemed to have anticipated such problems. They also accept more informal, editorial sort of contributions. Freed from academic pressure, I gladly accepted to contribute by writing this modest essay, which reflects on my impressions and recollections of the art of judicial reasoning from my experience as a judge. This experience is limited in time, since I was called to the bench relatively late in my career (2010), and in space, because it is confined to one court only, the General Court of the European Union (the "General Court").

Before sharing my impressions with Carl and, hopefully other readers, I should first say a few words about my understanding of "the art of judicial reasoning", which is the title suggested by the organisers of the *liber amicorum*. In my view, art

Vice-President of the General Court of the European Union.

M. van der Woude (✉)

General Court of the European Union, Luxembourg City, Luxembourg

refers to creativity or skills and appeals often to imagination and emotion. When combined with the notion of judicial reasoning, the concept of art evokes the picture of a wise individual sitting behind his or her desk weighing the pros and cons of the arguments raised by the parties and ultimately producing a compelling solution which the losing party is willing to accept. Now, if the art of judicial reasoning is defined in this individualistic manner, I wonder, in the light of my limited experience, whether that art exists at the General Court.

Judges at the General Court do not enjoy much room to manoeuvre. Their freedom of action is limited by a series of factors, which I will shortly address in turn: (1) the nature of judicial review, (2) the structure of the General Court, (3) the working methods used and (4) the importance given to existing case law. I will then try to answer the question put above: is there such a thing as an art of judicial reasoning at the General Court?

2 The Nature of Judicial Review at the General Court

The name of the General Court is well chosen. It deals with (nearly) all cases brought by individuals, companies and, sometimes, Member States against the action or inaction of EU institutions. The cases lodged at the General Court reflect the growing diversity of European law. Moreover, these cases are increasingly complex, both from a regulatory and a factual point of view.

Most of these cases are assessed on the basis of Article 263 TFEU which lays down the action for annulment of the acts taken by the European institutions and their agencies. The General Court is therefore, essentially, an administrative review court which assesses the legality of the acts of the European institutions. In carrying out this review, the General Court is bound by the order sought by the applicants along with the pleas and grounds that they put forward in support of their claim.¹ It is for the applicants to decide which acts they challenge and whether they seek total or partial annulment. The supporting pleas relate either to specific rules or principles which the defending institution is alleged to have infringed, or to an error which the defendant is said to have made in its assessment of factual issues. The General Court must respond to these specific arguments, without having the possibility to substitute its own views to those of the administration.² Consequently, the onus is on the applicants to determine the scope and subject matter of the case and, to a lesser extent, to define the structure under which the General Court will deal with it. With the exception of public policy considerations, which the judges can raise on their own motion, the General Court cannot rule *ultra petita* and grant an annulment which goes beyond that sought by the applicant.³

¹ See Barents (2016), Chapter 16.

² Judgment of 24 January 2013, Case C-73/11 P, *Frucona Košice v. Commission*, EU:C:2013:32.

³ Judgment of 14 November 2017, Case C-122/16 P, *British Airways v. Commission*, EU:C:2017:861.

It should be noted, however, that the General Court is not passive either. When appropriate it can, and indeed, does restructure the pleas and grounds for annulment by dealing with them in a different order from the one chosen by the applicant in its appeal. For example, if the General Court considers that one plea justifies the annulment of the contested act, it will most probably deal with that plea first and then rule that, since the act is annulled on that basis, there is no reason to rule on the other pleas. Similarly, if the General Court considers that the admissibility issues raised by the defendant are well founded, it will dispose of the case by limiting its judgment or order to these issues, without dealing with the substance of the case. Conversely, if it considers that the pleas and grounds are bound to fail, it may decide for pragmatic reasons to rule on the substance of the case without ruling on the inadmissibility defence.⁴ The General Court may also, where appropriate, reformulate the pleas put forward by the applicants. Rather than focusing on the formal label which the applicants attach to their pleas, it will examine their substance so as to find out what their real intention is and requalify the plea accordingly.⁵ This practice seeks mainly to take account of the different legal traditions in the European Union. Since concepts used by the Union courts do not necessarily correspond to those used in the legal systems of the Member States, the General Court favours a flexible approach.

This flexibility should not be exaggerated. Even if the General Court has some leeway in restructuring the case which is brought before it by the parties, it remains very much bound by their submissions. This obviously has an impact on the way in which a judgment will be drafted.

3 The Structure of the General Court

The cases brought before the General Court are assigned by its President to chambers and within each of these chambers to an individual judge. This judge ‘*rapporteur*’ reports during the whole procedure to his or her colleagues, who work in units of three or, for more complex cases, in units of five judges. There are very few decisions, even procedural ones, which a judge can take alone. Even if the presidents of chambers have more decisional powers, they are likely to share these powers with their colleagues, especially when the decisions address particularly delicate issues.

The collective nature of the General Court is further reinforced by the fact that the judges prepare their proposals in so-called *cabinets*. These are teams of legal experts (law clerks or *référéndaires*) and support staff that assist the judge in studying the case files as well as in preparing reports, draft judgments, and memos. Rare are the situations in which a judge takes a position which he or she has not discussed before with *cabinet* members.

⁴ Judgment of 26 February 2002, Case C-23/00 P, *Council v. Boehringer*, EU:C:2002:118.

⁵ Judgment of 6 September 2013, Case T-110/12, *Iranian Offshore Engineering & Construction v. Council*, EU:T:2013:41.

As a result, decision making within the General Court is predominantly collegiate in nature. Nonetheless, despite its predominantly collegiate nature, the General Court does not generally operate as a single unit. The chambers work very much as individual production units. Even if several coordination mechanisms have been put in place to ensure consistency in decision-making, chambers and *cabinets* are very keen on their “autonomy”, which many see as an expression of the concept of judicial independence. If any authority is accepted, it is the authority of the judgments of the Court of Justice.

These findings imply that, the art of judicial reasoning at the General Court is necessarily a collective one reflecting the opinion of the decision-making unit. Very often, colleagues will not only discuss and agree on the outcome and substance of the case, but also on the form and wording of the judgment.

4 The Working Methods at the General Court

The General Court, like the Court of Justice, is an international court. This is reflected in the first place by the plurality of languages which the parties may choose. In fact, cases can be brought before the General Court in each of the 24 official languages of the European Union. Although many judges are fluent in several languages, there is no judge that masters all of them. Moreover, collective decision-making and the principle that judicial deliberations are secret necessarily implies that the judges must have a common working language. For historical reasons, this working language is French. The Court of Justice of the Coal and Steel Communities (the 1952 predecessor of the Court of Justice of the European Union) worked exclusively in French. Ever since, French has *de facto* remained the working language. Moreover, the fact that French is one of the official languages of the host country, Luxembourg, further contributed and continues to contribute to the use of this language.

Obviously, as French literature shows, French is a very rich language which can be used in many ways. There is no apparent reason why judgments written in that language could not reflect a specific art of judicial reasoning and grant judges a certain freedom to express their thoughts. However, the judgments of the General Court are unlikely to win the *Prix Goncourt* or other literary awards. The French in which the judgments are drafted is very specific and does not have much literary merit. This specific use relies heavily on one of the features of the French language, which is its degree of precision. Conjugation ensures that verbs and adverbs are attached to the right noun, allowing the use of relatively long sentences. The reliance on long sentences is further facilitated by using certain conjunctive words and phrases, which are less common in other languages. Expressions, such as, “*par conséquent*” (in consequence), “*partant*” (therefore), “*en effet*” (indeed) and “*or*” (well) allow the author to indicate the connection between sentences, whereas the sequence of such sentences in English would have to be established by their substance rather than by their form.

Also, the judgments of the General Court tend to be both long and uniform. Their length can be explained by various reasons. These relate, on the one hand, to an idea of professionalism pursuant to which each and every argument put forward by the parties must be addressed, and, on the other hand, the belief that this method is imposed on the General Court by the Court of Justice. With respect to the uniformity of the language used in the judgments, several factors play a role. The main reason relates specifically to collegiate decision-making. The judges and their *cabinets* expect drafts to be presented in a standardised form that facilitates their understanding and the submission of comments. This form usually starts with a summary of the arguments of the parties, followed by quotations of relevant case law and an analysis of each of these arguments. This analysis is often structured as follows. The main reasons upon which the judgment relies are categorised as follows: in the first place, in the second place etc. Each of these categories is further subdivided by using numbers (first, second, third etc.) and each number can then be further broken down by using less rigid phrases such as “on the one hand” and “on the other hand”. In addition, when assessing the arguments raised by the parties, the General Court most often relies on indirect wording, using phrases and expressions, such as ‘it should be noted that’ ‘it must be recalled that’ or ‘it is apparent that’. This indirect wording is reminiscent of the “considerations” (“*considérants*”) which are used in many continental legal traditions. It is impersonal and further emphasises the collegiate functioning of the General Court.

Another reason that helps to explain the relative uniformity of the General Court decisions relates to the use of models and tools supporting the decision-making. This concerns trade mark cases in particular.

Finally, there are linguistic reasons why the General Court is attached to uniformity. Since the common working language is foreign to most colleagues, all drafts must be checked and verified by a team of experts that ensure linguistic and formal consistency.

5 The Value of Precedents at the General Court

The international character of the General Court is reflected by the diversity of its members. They originate from 28 different countries with as many (legal) cultures and traditions. Despite this diversity, judges must together interpret Union law, which by its very nature tends towards uniformity as EU law must be the same for all EU citizens. Although EU law is increasingly composed of Regulations and Directives, it finds its roots in the Treaties and in the way in which the Court of Justice interpreted the Treaty provisions by blending legal traditions and focusing on Treaty objectives. The foundations of EU law were laid down in many respects by the case law of that Court. The General Court follows this case law approach by attaching great value to precedents. The corpus of case law is the common legal ground for all members of the General Court and is revered as such. It creates the

terra cognita known to all.⁶ A search for precedents is often the starting point of legal analysis.

One may wonder whether this respect for precedents is sometimes pushed a bit far. There are some instances in which precedents or even parts of precedents are quoted as if they were provisions of an abstract legal code. Such citations do not always refer to the specific factual context in which the precedents were created. This can prove to be problematic, because a judgment that gave a right legal answer to one specific set of facts is not necessarily relevant or adequate when dealing with a different set of facts. The distance between precedent and facts becomes even greater when case law is quoted “by analogy” or “in that sense”.

Moreover, EU case law has grown exponentially over the years. Unlike the founding years in which precedents had to be created, judges now face mountains of existing case law covering many areas of EU law. In addition, this case law is not necessarily structured or continuously reviewed. Rare are the cases in which the General Court explicitly announces that they put aside or “specify” an existing precedent.

Furthermore, it is not always clear to me what legal message or principle the quoted precedents are supposed to convey. For example, there is a string of trademark case law that states that the words at the beginning of a verbal trademark carry more weight than those listed at the end, but there is also case law indicating that this is not always the case. Since the choice between the two probably depends on the specific facts of the case at hand, citing either case law does not seem of much use. There are also other quotations that may raise more questions than answers, for example the definition of what should be understood by legitimate expectations, the relation between the equality principle and the legality principle or the co-existence of trade marks. I do not submit that these precedents are wrong or incorrect, but simply that a judgment that quotes them without further inquiry or explanation as to their significance and relevance in a specific factual setting is built on weak foundations.

6 Final Observations

As mentioned in the introduction, I define “art” as relating to individual skills or creativity. It is difficult to leave one’s individual mark on a judgment of the General Court. I tend to consider that the lack of any specific or individual art of judicial reasoning is the necessary price to pay for team work and collegiality. If any activity is to be qualified as an “art” at the General Court, it will most probably relate to the skills and capabilities allowing a judge to properly brief his or her colleagues, propose a solution that leads to consensus or a majority without creating friction, be sufficiently flexible to adapt her or his proposal to accommodate the colleagues and deliver a judgment within a reasonable time frame.

⁶See Temple Lang (2011), p. 141.

Collegiality, flexibility, and determination are in my view the main skills that a judge needs at the General Court. These qualities do not conflict with creativity and innovation. New ideas are always welcome, especially when the case law must be adapted to societal changes or when the institution must be reorganised to face new challenges. Even so, having ideas is not enough. Colleagues need to be convinced as well. Consequently, if there is an art of judicial reasoning at the General Court it is a collective and collegiate one.

The General Court is at present a very large jurisdiction, and is likely to become in 2019 the world's largest international jurisdiction. As any other organisation, it has its customs and traditions resistant to change. Building the consensus that allows an organisation to overcome this natural inertia is in my view a far greater art than simply writing learned opinions and legal masterpieces. This begs the question whether there should be an individual art of judicial reasoning. I suggest submitting this normative question to Carl's more experienced reflection and hope to learn from him what his thoughts on this issue are.

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Comparative Law as an Element of Reasoning



Hubertus Schumacher

1 Trends in Comparative Law

There is still no *communis opinio* on the inclusion of comparative law as an element of reasoning in judicial decisions. There is no accepted plurality of methods which also includes comparative law in the traditional canons of historical, grammatical, systematic and teleological interpretation of judicial decisions.¹ However, since the mid-twentieth century, there has been growing internationalisation of case-law and jurisprudence as well as an increasing cross-border dimension to the search for internationally acceptable and just solutions.² It is even sometimes claimed that we are in a “century of comparative law”.³ This trend involves taking account of the legal system and practice of other countries, but, in that regard, the courts do not march in step with science. Although at international level, in the extensive body of case-law, a comparative interpretation is still the exception rather than the rule,⁴ the decision-making practice of the courts of individual European States demonstrates an increasing willingness to rank comparative law amongst the traditional canons of interpretation. Reference should be made, in particular, to the Federal Supreme Court of Switzerland (*Bundesgericht*). Its affinity towards comparative law methods⁵ has even been described as a “*conception universaliste*”.⁶ The Swiss

President of the Princely Supreme Court of Liechtenstein.
Translated from German by Rebecca Lee.

¹ Kischel (2015), § 3, point 1; Strauch (2017), p. 458 et seq.

² Kadner Graziano (2014), p. 477.

³ Husa (2005), p. 55.

⁴ Kischel (2015), § 2, point 77.

⁵ See also Kramer (2016), point 277 et seq.

⁶ Baudenbacher and Spiegel (1990), p. 229; see also Walter (2007), p. 262.

H. Schumacher (✉)

Princely Supreme Court of Liechtenstein, Vaduz, Liechtenstein

Federal Supreme Court has always been known to rely, in particular, on comparative law as a method of interpretation and has earned a reputation for taking the greatest account of comparative law when compared to international standards of national courts at final instance.⁷ In BGE 126 III 129 (138), the Swiss Federal Supreme Court even stated that “particularly in the event of conventional cross-border legal relations [...], a proper determination of the law and therefore judicial gap-filling is not possible without a comparative law basis”.⁸ This sentence is more significant than it seems at first glance: comparative law plays a crucial role in the decision-making practice of the Swiss Federal Supreme Court in a very important area of commercial law. Kadner Graziano⁹ reports that an analysis of some 1500 judgments of the Swiss Federal Supreme Court from the 1990s revealed that the court refers to the external legal situation by way of comparison in approximately 10% of its judgments and, moreover, in judgments relating to liability, it makes a comparison in approximately 20% of the published decisions. In other continental European legal systems, one can observe only an occasional comparison with the laws of other countries.¹⁰ According to academia, the case-law of the Swiss Federal Supreme Court should be classified as recognising comparative law as an independent means of interpretation within the framework of a so-called “pragmatic plurality of methods”, but this is not the last word on the matter.¹¹ Looking more broadly at the topic, there exists a clear emphasis on comparative law in judicial decision-making practice. It is reported from the Anglo-American legal sphere that constitutional courts are increasingly relying on the comparative method as a source of inspiration, and comparative law is by no means restricted to private law.¹² In Austria, the Constitutional Court (*Verfassungsgerichtshof*) has had recourse to constitutional comparison on basis of the unstated presumption of its fundamental admissibility and effectiveness as an important source of potential knowledge.¹³

The dedicatee Carl Baudenbacher has always attached particular importance to the comparative law method: in his *magnum opus* “*Lauterkeitsrecht*”¹⁴ he pointed out that looking beyond national ‘borders’ is crucial in the light of the objective of “Euro-compatibility” (“*Eurokompatibilität*”). However, irrespective of the political need for compatibility with EU law, he takes the view that methodological consideration of the arguments put forward and rejected in other legal systems is necessary in the interests of establishing a European “*ius commune*”. The author can only but agree with those comments. Indeed, the approach of “looking beyond the borders” adopted by Baudenbacher, as the long-standing and defining President of the EFTA Court, has permanently shaped European law. During his presidency, the Court has

⁷Walter (2007), p. 262.

⁸See also the note in Kramer (2016), point 279.

⁹Kadner Graziano (2014), p. 480 et seq.

¹⁰Kadner Graziano (2014), p. 480.

¹¹Kunz (2009), pp. 64 and 65.

¹²Kadner Graziano (2014), p. 481.

¹³Fuchs (2010), p. 183. n. 70; Kadner Graziano (2014), p. 481, footnote 70.

¹⁴Baudenbacher (2001), Vor Art 2, point 74.

handed down landmark judgments and has significantly promoted legal unification in Europe. The author hopes that the Jubilarian will continue his successful endeavours at European level.

2 Comparative Law in Liechtenstein as a Country of Reception

2.1 Comparative Law: A Practised Method of Interpretation

From one perspective, the need for comparative law can be seen in a country of reception such as the Principality of Liechtenstein: at the beginning of the nineteenth century, Liechtenstein adopted important laws in the sphere of private and civil procedure law of its neighbouring states *en bloc*. In 1812, Liechtenstein adopted the Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch*) of 1 June 1811 (with the exception of the provisions on inheritance) which applies across the national territory. The provisions on inheritance, which were originally repealed from the law on which the legal reception was based, followed in a subsequent act of 1846. In 1861, the German Commercial Code (*Handelsgesetzbuch*) was introduced. In 1912, the Austrian Code of Civil Procedure (*Zivilprozessordnung*), together with the act governing the jurisdiction of the courts (*Jurisdiktionsnorm*), entered into force in Liechtenstein with minor simplifications.¹⁵ In view of the comprehensive legal reception of Austrian and German law, the Liechtenstein courts have – over the course of many years of application – increasingly sharpened the “look beyond the borders” towards the states from which the laws were adopted *en bloc*. In principle, the Principality of Liechtenstein has today reached a broad consensus in both theory and practice that comparative law is a crucial element in the judicial application of the law. In 2000, the Liechtenstein Constitutional Court (*Staatsgerichtshof*) expressly held that it is, in principle, permissible for courts to carry out a comparison of laws during proceedings. In any event, for a small country which has adopted numerous provisions from neighbouring states and which has itself only a rather small body of domestic case-law at its disposal, it is perfectly justified to consider comparative law as an accepted “*fifth method of interpretation*”.¹⁶ The Constitutional Court discussed the methods of interpretation in detail in 2016,¹⁷ stating that there is no method of interpreting legal rules which is generally binding: the objective of legal interpretation is to establish the purpose of a provision, and more specifically, to determine the meaning of the law. Grammatical interpretation is only one of several methods of interpretation, which are, according to recent legal

¹⁵ On this reception see Kohlegger (2013), p. 1061 et seq.

¹⁶ StGH 7.6.2000 StGH 2000/1, LES 2003, 71 (76), referring to Höfling (1994), p. 46; see also Obwexer (2013), p. 138; Walter (2007), p. 259; Kadner Graziano (2014), p. 486; Kozak (2015), p. 60.

¹⁷ StGH 7.10.2016, SV.2016.3, LES 2016, 267.

methodology, of equal value in principle. In addition to the traditional canons of interpretation (grammatical, historical, systematic and teleological interpretation), there is also comparative law and constitutional interpretation. The Constitutional Court thus refers, for example, comparatively to Austrian doctrine and case-law with regard to both procedural and private law. The case-law of the two neighbouring states, Liechtenstein and Switzerland, is thus linked, *inter alia*, by the appreciation of comparative law as a method of interpretation and as an element of reasoning; although the main reason for this practice in Liechtenstein is undoubtedly found in its comprehensive legal reception of laws. From this flows a noticeable trend in the case-law to take account of the “Mother Law” (*Mutterrecht*) in relation to its legal order, not only in terms of the law’s origins but also with regard to its legal development through judicial application.

2.2 *The Princely Supreme Court and Comparative Law as an Element of Reasoning*

2.2.1 In the Application of Adapted Law

Since the Princely Supreme Court (*Fürstlicher Oberster Gerichtshof*) is generally favourable towards comparative law, it has repeatedly incorporated the case-law of countries, from which the provisions were adapted, as an element of its reasoning. Above all, recourse is had to comparative law in addition to historical interpretation in order to determine the will of the legislature and the teleology of the received law in question. Next, when it comes to interpreting the law received from neighbouring states there is – contrary to when harmonised laws are interpreted – no systematic link in respect of which rules take precedence.¹⁸ Or, as Marc Amstutz¹⁹ rightly states, judicial decision-making practice “cannot be constrained by theoretical methods”. Nevertheless, an attempt is usually made to ensure an interpretation that is consistent with the “template” (“*vorlagenkonforme Auslegung*”), since the genesis and teleology of the received law is indirectly also that of its own law. Therefore, especially in these cases, arguments based on comparative law often include a historical-teleological element: what was the reasoning of the historical legislature of the “Mother Law” in relation to an act that was adapted into Liechtenstein law? Of course, another practical reason why recourse is often had to a historical comparison of laws lies undoubtedly in the fact that the judges of the Princely Supreme Court, trained in Austrian law and practising in Liechtenstein, have traditionally regarded the teleology of a law as an important basis for interpretation. Indeed, the purpose of the law is primarily inferred from the historical objectives of the legislative process, in particular from the so-called “preparatory documents” (government bills, committee reports etc.). These legislative considerations continue to be

¹⁸Walter (2007), p. 269.

¹⁹Amstutz (2004), p. 88.

relevant in the country of reception, with the result that the corresponding interpretation by the courts in the country of origin should also be taken into account. However, this means that account must be taken not only of the bare legal texts but also the “real-life application of the law” in the country of origin (Law in Action).²⁰

In addition, comparative law also serves to support the reasoning of the Princely Supreme Court’s decisions.²¹ Examples include the meaning and purpose of capital protection²² in the light of German and Austrian company law²³; or a reference to the Swiss Federal Supreme Court on the question of the admissibility of medical reports in legal proceedings, where that had already had recourse to comparative law, to which the Princely Supreme Court refers in its decision.²⁴ In social security law, judgments regularly refer to the Swiss Federal Supreme Court and – until the end of 2006 – referred to the Federal Insurance Court (*eidgenössische Versicherungsgericht*). Moreover, the case-law of the Princely Supreme Court in relation to whiplash injuries and the question of their adequate causality for psychological consequences, work or earning disability, has for many years taken account of the case-law of the Swiss Federal Supreme Court and has, to a large extent, followed it.²⁵ An “affirmative” recourse to comparative law was also had to the German Federal Court of Justice (*Bundesgerichtshof*) and its case-law on § 15a EGZPO (Introductory Act to the Code of Civil Procedure) read in conjunction with § 696 ZPO (Code of Civil Procedure) on the question of the necessary lawful submission of documents in out-of-court dispute resolution proceedings.²⁶ In that regard, the Princely Supreme Court also made an additional comparison with the Swiss Code of Civil Procedure (§§197, 201 et seq. Code of Civil Procedure). In the case-law of the Princely Supreme Court, procedural legal comparisons have also been made between the rules on jurisdiction (§ 50(1) and (2) JN) and § 23d of the Code of Civil Procedure – which has the same content but has not been adapted into Liechtenstein law – and the relevant case-law of the Swiss Federal Supreme Court. Other laws, such as the Liechtenstein Law of Property (*Sachenrecht*), are so heavily imbued with Swiss law they are often interpreted in accordance with Swiss case-law for that mere reason. But also the influence of European Civil Procedure law on the case-law of the Princely Supreme Court is clear: with a view to “European Civil Procedure Law” (Article 3 Abs 2 EuGVVO), it was held that the *special forum connected to domestic assets*²⁷ is regarded an “undesirable,” so-called exorbitant jurisdiction,

²⁰ Kischel (2015), § 1, point 6.

²¹ See, in detail, on the functioning of the possible applications of the comparative method: Kadner Graziano (2014), p. 482 et seq.

²² Article 312(2) PGR.

²³ OGH 1.2.2017, 09 CG.2016.111, OGH. 2016. 159.

²⁴ OGH 7.9.2012, Sv.2011.42.

²⁵ OGH 07.12.2006, 8 CG.2004.318, LES 2008 223; 05.02.2009, LES 2009 213; 01 CG.2007.288, LES 2011, 1.

²⁶ OGH 05 CG.2011.138 referring to BGH 17.6.2004 IX ZB 206/03.

²⁷ Cf. in this regard Annex I to Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters,

which meant that the interpretation reached was supported in terms of European law.²⁸ On the question whether comparative law is a recognised element of reasoning in judicial decisions, in so far as Liechtenstein is concerned, the case-law of the Princely Supreme Court is well-founded, if not settled, and answers that question in the affirmative.

There are, however, other functions of comparative law in the case-law of a small country of reception: considering that in such a country there are far fewer cases to be decided in relation to the adapted provisions when compared to the larger country of origin and that, in simple terms, due to the lack of disputes there exists a certain absence of relevant rulings, comparative law assumes the function of a “*source of ideas*”.²⁹ A fair bit of material in the context of the decision-making process from the country of origin in relation to different facts and circumstances demonstrates the limits of interpretation of the provision to practitioners in the country of reception. These limits may be significantly wider or narrower than what would be assumed in the country of reception without reference to the judicial practice abroad. Comparative law in the country of reception is therefore simply necessary in order to prevent judicial interpretation from disregarding both the origins and the development of the adapted laws. Ultimately, the use of comparative law in the country of reception often serves an “*impact analysis*”,³⁰ for example when it comes to interpreting a seldom applied provision in accordance with foreign case-law. The consequences of that case-law, as observed in the country of origin, may be such that the interpretation is disregarded from the outset. In that case, the courts will carry out their own interpretation with reference to a necessarily “*contrasting*” set of consequences, in order to justify derogation from the foreign case-law.

As a result, the Princely Supreme Court advocates a thoroughly “dynamic” approach to comparative law with regard to the reception of law. In a judgment from 2012³¹ that court expressly stated that received law should apply in Liechtenstein in the same way that it applies in the country of origin (*Law in action*). The Liechtenstein legislature sought to focus its own law in that regard. However, that theory does not rely on the practice, which is applied, *inter alia*, in out-of-court proceedings, or in lower courts. Rather, received law should be applied in the same manner as it has been applied by the highest courts in the country of origin. Thus, the Princely Supreme Court regularly bases its decisions on the case-law of the highest courts in the country of origin. The fact that reporting judges of the Princely Supreme Court traditionally come from Austria and Switzerland supports this trend towards comparative law.

which refers to Article 99 of the Austrian JN. § 50 of the Liechtenstein JN – referred to above – has certain similarities with this provision.

²⁸ OGH 13.1.2005, 9 CG.2002.63 referring to BGHZ 115, 90 = IPrax 1992, 160.

²⁹ See Baudenbacher and Spiegel (1990), p. 260; Kischel (2015), § 9, point 203 (“*Inspirationsquelle*”); on this function see the seminal Kramer (1969), p. 1.

³⁰ Kadner Graziano (2014), p. 483 et seq.

³¹ OGH 7.9.2012, Sv.2011.42.

However, the Princely Supreme Court also reserves a right *to depart from the case-law of the supreme courts of the country of origin, where valid reasons exist*.³² The departure must, in principle, be adequately justified,³³ in particular if, for example, the Princely Supreme Court has already had recourse to the relevant case-law of a foreign supreme court, which would then lead to a change in the case-law. Only in particular circumstances, which must be justified on a case-by-case basis, may there be a departure from the case-law of a foreign court in relation to the received law. This assertion – which is, in my opinion, too extreme – should be tempered such that case-law in the country of reception may depart from that of the country of origin if the legal or economic conditions have changed in comparison to those in the country of origin to the extent that the continued reference to the case-law in relation to the previously received law is no longer viable. This assessment may be carried out, in particular, on a case-by-case basis with regard to *differing interpretations of new laws* in the country of reception, which are no (longer) compatible with the interpretation of the foreign courts. However, foreign case-law may also be simply outdated and no longer in line with the modern requirements in the country of reception or at least can no longer keep pace. A departure from case-law of the country of origin appears advisable, for example, if the case-law in the country of origin fixes and “fossilizes” the will of the legislature at the time the law was drafted, whereas the case-law in the country of reception seeks to take account of the social realities and the current situation *hic et nunc*, within the meaning of Konrad Zweigerts’ opinion.³⁴ However, this does not mean that comparative law loses its relevance: rather it shows that the focus on foreign case-law may not or no longer appear justified. Focusing on “stalled” or even retrograde case-law of the country of origin cannot be justified in the country of reception on the basis of the historical situation at the time of reception alone, if the courts have recognised the need for further development of the case-law. The change in focus results from the basic requirement that any method adopted in the main proceedings must always satisfy the *purpose of the legislative prerogative*.³⁵ If the interpretation that was taken over into the country of reception on basis of comparative law, does not (or does no longer) correspond to the legislative prerogative pursued by the legislature, its courts can, or rather must, depart from that interpretation or decisions handed down by the courts in the country of origin. The same must be true for the question whether departure from the case-law of the country of origin should be possible – even though there is no new legal evaluation recognised in the country of reception – when the application of foreign case-law in relation to the “Mother Law” in the country of reception leads to socially or economically unacceptable results. In the event of such a divergence, a departure from foreign case-law can also be justified having recourse to the purpose of the legislative prerogative, which in the country of

³² OGH 7.9.2012, Sv.2011.42; 4.4.2002, 1 CG.2000.64, LES 2005, 100 (Erw 19); see StGH 30.6.2003, StGH 2002/88.

³³ StGH 30.06.2014 StGH 2014/10.

³⁴ See Zweigert (1949/50), p. 6.

³⁵ On the term and its roots: Strauch (2017), p. 477.

reception was based on certain situations requiring regulation at the time of reception, while the development of the case-law in the country of origin is no longer in line with the regulatory intention. The author affirms that in such cases there exists a possibility for the courts in the country of reception to depart from the case-law of the country of origin. The, in principle, necessary usage of comparative law can never lead to *slavish imitation* of the law in the country of origin, but must always be measured against both the developing legal system, its evaluation and the changing economic or social conditions in the country of reception. Admittedly, such changes must be brought about by the legislature in the country of reception so as to initiate “normative compatibilisation”.³⁶ On the other hand, the insight gained through comparative law that a foreign rule is ‘better’ than the national equivalent cannot invalidate the national rule.³⁷

2.2.2 The Application of Non-received Law

Even in cases that do not involve reception of laws, the Princely Supreme Court adopts an approach of “looking beyond the borders.” For example, a change of practice of the Swiss Federal Supreme Court was decisive for the question of crediting mixed donations in the assessment of statutory inheritance shares and the respective method of calculation.³⁸ In questions relating to the law on foundations, the focus lied consistently on Austrian foundation law – albeit only in an affirmative or contrasting manner³⁹ – especially as Liechtenstein has its own and a more recent foundation law. In that regard, the adoption of foreign rules (in this case Swiss law) was expressly rejected, since the legal issue in question could be resolved “on the basis of the clear wording of Article 76 VVG alone and an interpretation supported by the legal provisions of other states is therefore unnecessary.”⁴⁰ Therefore, if the court finds that a provision of Liechtenstein law does not require interpretation, the comparative method is disregarded. However, it should not be denied that is just as unlikely to encounter objectively “clear” wording⁴¹ as it is to have an unambiguous provision of law or full codification.⁴² The above citation from Liechtenstein case-law can be regarded as having similarities to the doctrine of *acte clair* in relation to the question whether a reference for a preliminary ruling should be made to the Court of Justice of the European Union, in the sense that there exists no reasonable doubt surrounding the interpretation in a particular case. Finally, it must not be overlooked that in a number of cases the Liechtenstein courts have obtained legal

³⁶ The term is used in Amstutz (2004), p. 73, in connection with the necessary adaption of differences between original and received rules (interlegality) through legal findings.

³⁷ Zweigert (1949/50), p. 10.

³⁸ OGH 1.10.2004, 01 CG.2003.159-36, referring to BGE 98 II 352.

³⁹ OGH 5.2.2004, 10 HG.2002.26.

⁴⁰ OGH 6.5.2011, 01 CG.2008.156.

⁴¹ Gauch (2004), p. 175; see also BGE 127 III 445.

⁴² Zweigert (1949/50), p. 5.

opinions, in particular from the Swiss Institute of Comparative Law, on issues relating to foreign law.⁴³

2.2.3 In Matters of European Law

In addition, the functions of applied comparative law in Liechtenstein at European law level should be mentioned briefly, where the comparative method often has some sort of validating or confirmatory function.⁴⁴ This relates to the fact that the EFTA Member Liechtenstein is also a member of the European Economic Area (“EEA”) and must therefore take account of European regulations. In fact, as Kischel⁴⁵ points out in his standard work on comparative law, the law of the European Free Trade Association (“EFTA”) and the EEA are so closely linked to EU law that knowledge of one without knowledge of the other may cause difficulties. The multi-level system of European law – national legislatures, EU directives, case-law of the Court of Justice of the European Union and the EFTA Court – undoubtedly creates new challenges for the methodological tools.⁴⁶ Against this legal background, it is no longer sufficient for the scope of interpretation to be restricted to national law alone. On the contrary, the courts in Liechtenstein are required to use comparative law at EU level, including the look towards the interpretation of EEA-relevant EU law of the courts in EU – Member States,⁴⁷ since uniform interpretation of European law is required by the EEA. In this area one may speak of so-called “compulsory comparison of laws”.⁴⁸ However, in the event that the interpretation of European law does not lead to a clear conclusion, the case must be referred to the EFTA Court for a preliminary ruling. Accordingly, Liechtenstein courts have, on a number of occasions, submitted references for a preliminary ruling to the EFTA Court, which resulted in answers that were considered to be groundbreaking in terms of European law.⁴⁹ From this point of view, the comparative method adopted by the Liechtenstein courts serves, on the one hand, to confirm or guarantee, in the grounds of the decision, that its own interpretation is in line with the international and, in particular, European “interpretative *acquis*”. Comparative law therefore also supports the European objective of approximation of laws. On the other hand, the comparative methods used also leads, in cases of doubt, to obtaining

⁴³ See, inter alia, OGH 14.2.2003, 01 CG.2000.9-77; 11.4.2014, 10 CG.2006.379; 2.8.2013, 10 CG.2006.379 and others.

⁴⁴ In that regard, Kodek (2013), p. 196; Kozak (2015), p. 60 et seq.; see also Walter (2007), p. 261.

⁴⁵ Kischel (2015), § 11, point 46.

⁴⁶ Strauch (2017), p. 21; see also Hotz (2012), p. 137.

⁴⁷ See also Walter (2007), p. 268; Amstutz (2004), p. 85.

⁴⁸ Kozak (2015), p. 63; see, on the CJEU’s commitment to comparative law: Obwexer (2013), p. 121 et seq.

⁴⁹ Compare only Joined Cases E-15/15 and E-16/15, *Franz-Josef Hagedorn v Vienna-Life Lebensversicherung AG and Rainer Armbruster v Swiss Life (Liechtenstein) AG*, EFTA Ct. Rep. [2016] p. 347.

the necessary interpretive guidance for the EFTA pillar by an apex court, i.e. the EFTA Court, through the means of a reference for a preliminary ruling. This ensures the indispensable decision-making harmony within the EEA.

3 Conclusion

With regard to the case-law of the courts in small countries such as Liechtenstein, which has received important legal rules from neighbouring states *en bloc*, the following conclusions may be drawn. In a country of reception, like the Principality of Liechtenstein, comparative law is an essential method of interpretation to which the courts regularly have recourse. Focus on the case-law of the supreme courts in the countries of origin is a precept inherent in legal reception, insofar as it is indispensable to understanding the teleology of the received law and its development in practice. So far as comparative law is concerned with European law, it is an essential signpost on the path to European approximation and harmonisation of laws. Accordingly, the courts of the Principality of Liechtenstein take their lead from it.

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“*Fiat Justitia ruat caelum*”. Is This a Good Guide to the Role of a Specialist Appeal Court Judge?



Peter Freeman

1 Introduction: *R v Wilkes*

Legal maxims can be of great help in establishing rules or in turning inchoate ideas into something concrete. The phrase “*fiat justitia ruat caelum*” (let justice be done though the heavens fall) seems to tell the judge that his or her task is to do justice and not to worry too much about the wider consequences. The implications of this maxim are the subject of this short paper.

Of course, like all apparent certainties, the foundations on which the maxim rests are not as sure as might be supposed. The source most often quoted is Lord Mansfield, the distinguished Scottish judge¹ who was for more than 30 years from 1756 Chief Justice of the King’s Bench, in a case involving the detention, under a so-called “general warrant” of John Wilkes. Wilkes was a somewhat controversial Member of Parliament who stood accused of sedition against the King, although his real quarrel was with the government of the day. In the report of the case Lord Mansfield is quoted as follows:

Reasons of policy are urged, from danger to the kingdom, by commotions and general confusion...The constitution does not allow reasons of State to influence our judgments: God forbid it should! We must not regard political consequences; how formidable soever they might be: if rebellion was the certain consequence, we are bound to say “*fiat justitia ruat caelum*”.²

Chairman of the Competition Appeal Tribunal.

As may be presumed, any opinions expressed in this paper are entirely the author’s own, and do not in any way represent the views of the CAT or of any other body.

¹To be accurate, William Murray, (1704–93) Earl of Mansfield, was a Scotsman who was an English judge.

²*Rex v John Wilkes, Esq.* 7 February 1770 (1770) 4 Burrow 2527, 98 E.R. 327.

P. Freeman (✉)

Competition Appeal Tribunal, London, UK

Although this is often cited as an example of a judge being willing to protect the innocent if justice demands it, Lord Mansfield is actually saying that if necessary he would commit Wilkes for trial, despite the baying mob outside the court. As it was, he did refuse to commit Wilkes on this occasion, but nevertheless committed him 10 days later.³ Lord Mansfield was a fine judge. He lived in Bloomsbury Square,⁴ where the present day Competition Appeal Tribunal (the “CAT”) is based, and his portrait hangs on the wall of the CAT’s Mansfield Room. But things are not always what they seem.

1.1 *The Need to do Justice*

The need to do justice is an obvious, almost trite, judicial requirement. The difficulty arises with the second part of the maxim, which could be seen as allowing a judgment to disregard all wider consequences outside the narrow scope of the dispute being tried. In competition law, as no doubt in many other fields, that poses problems. What if an appellant party has been unfairly treated by an authority, yet is clearly guilty of a serious infringing act? What if a party has been wrongly penalised by an authority, yet reducing the penalty on appeal may encourage other less worthy parties to seek redress also? And what if the appeal court repeatedly overturns an authority’s decisions on correct but possibly technical legal grounds such that the authority’s prestige and credibility are put in question? It is possible to see these cases as examples of situations where the wider consequences might have to be considered.

1.2 *Some Examples*

There are real life examples of this kind of situation arising. One of these is the celebrated case of *BAA airports*, in which the CAT reviewed two successive decisions of the Competition Commission (the “Commission”) ordering the airport operator BAA to divest two of its London airports and another in Scotland. The first appeal was on two grounds, first, of the apparent bias of one of the Commission’s members, who appeared to have an indirect interest in a potential bidder for the airports in question, and secondly on proportionality. The CAT found for the Commission on the second ground but against it on the first.⁵ In argument, counsel for the Commission emphasised the wider significance of the case:

³ See Rudé Wilkes and Liberty (1962), p. 57.

⁴ At nos. 28–29.

⁵ *BAA Ltd v Competition Commission (no 1)* [2009] CAT 35.

Mr Swift reminded the Tribunal at the beginning and again at the end of his submissions that the report is a very important decision for airport competition, airline competition, and consumer welfare, and followed a most extensive inquiry over nearly two years.⁶

In giving its decision, the CAT said:

We have reached our conclusions...with the greatest reluctance. We have throughout been very conscious of their implications for the report which followed a detailed inquiry over a period of two years, at great effort and expense to all concerned.⁷

This makes it clear that the issue of apparent bias over-rode any wider considerations such as the coherence of the enforcement system, and the delay in implementing the Commission's conclusions, the substance of which was not in doubt.

In the result, this judgment was itself overturned on appeal. The Commission re-opened its investigation and confirmed its previous decision some two years later. This decision was also appealed, although not on grounds of bias, and the CAT dismissed this second appeal.⁸ BAA was denied permission to appeal further and duly disposed of the airports as required by the Commission.

It may be asked whether the initial overturning of the Commission's decision was "right" in the overall context. That context of course was that the Commission had conducted a detailed investigation of the airports market, over two years, and concluded that divestment was needed. The CAT did not disagree with this. It did, however, clearly feel that the interests of justice had been infringed and that it was not safe to allow a decision which was tainted by the possible personal interest of one of the deciding panel members to be enforced.

Although the decision was painful to the present author, as the then Chairman of the Commission, it is clear that in this case the CAT was quite correct, given the view it had taken of the apparent bias in question. The fact that the Court of Appeal was able to show that the member's interest could not have affected the Commission's decision is not the point. The CAT thought that it did, and decided this over-rode any wider policy considerations. Put simply, justice requires decisions to be taken free from bias and outside interference – "reasons of state cannot influence our judgments", as Lord Mansfield might have said.

What is notable here is that both the Commission and the CAT were perfectly aware of the wider policy implications of a decision in this case. It was not a case of the CAT being unaware or ignorant of the context of the Commission's functions, methods and the decision it had reached in this case. Where they differed was in deciding what weight, if any, should be attached to these factors.

⁶Ibid. paragraph 98.

⁷Ibid. paragraph 264.

⁸*BAA Ltd v Competition Commission (no 2)* [2012] CAT 3 – see the later discussion at Sect. 2.1 below.

2 Should Competition Appeals Be Heard in the General Courts?

It is frequently asked whether competition appeals are better heard in a specialist court or in a court with general jurisdiction. This has been the focus of discussion at EU level at various times since the establishment of the Court of First Instance (now the General Court) and a House of Lords select committee even wrote a report about it.⁹ There are respectable arguments for both views.

One advantage the general courts have is unassailable independence. The rule of law requires judges to be independent; they swear an oath to that effect. Not only do they decide cases free from any kind of prejudice, but they are also free from political interference. It is very hard for any government to question the independence of the judiciary.

Another factor in favour of the general court approach is the inherent commonality of legal issues. Competition issues are, on this view, no different from complex commercial or financial cases. The court, with the assistance of the advocates arguing before it, can take all these issues in its stride. Experienced judges can readily see the error in an apparently technical argument and cut to “the nub of the case” in circumstances where a specialised judge might be seduced by technical wizardry.

Examples of “generalist” judges coming up against competition law sophistry can sometimes be refreshing. In the famous case of *Courage v Crehan*¹⁰ the judge at first instance¹¹ accepted the evidence in the case before him that the UK beer market was not “foreclosed”, as the European Commission had found it to be in various investigations. The judge was not impressed with the findings of other official bodies, however eminent, and he was willing to decide the case on its merits. The Court of Appeal held that it was not possible to ignore such relevant considerations but the House of Lords restored the lower court’s decision on the basis that the judge was not bound to follow the European Commission’s assessment. The case, however, is remembered more for moving the law forward on private damages actions, than for the role of the non-specialist judge.

Another example is the case of *BHB Enterprises v Victor Chandler (International) Ltd*,¹² which concerned a dispute between the British Horseracing Board and a bookmaker over the compilation and sale of data relating to horse races. One allegation was that BHB was abusing its dominant position by overcharging bookmakers for access to pre-race data. The judge, the late Mr Justice Laddie, was a widely respected expert in intellectual property law, but not a specialised competition lawyer. However, he heard argument from two such specialists as to whether a price

⁹ House of Lords European Affairs Committee, 15th Report of Session 2006-07 “An EU competition court”, published on 23 April 2007.

¹⁰ [2003] EWHC 1510 (Ch).

¹¹ Park J.

¹² [2005] EWHC 1074 (Ch).

greatly exceeding the cost of production was an abuse of dominant position. The judge said this:

Mr Turner (appearing for the bookmaker) argues that, in effect, there is a per se rule. As he puts it, where a dominant undertaking charges prices greatly in excess of the cost of production, this is in principle an abuse of its dominant position...Even before one considers the case law, it appears that this approach is based on a number of doubtful propositions....I do not see there is any necessary correlation between the cost of production and the cost of capital and the price that can be achieved in the market place....In addition this rule breaks down as soon as one applies it to the real world.¹³

And later on:

Indeed, were Mr Turner right, it seems to me that the law reports would be full of cases where undertakings in dominant positions would have been found guilty of abuse simply by charging high prices...the reality is that there are no such cases.¹⁴

The point is not the judge's finding on substance (which may or may not have been correct), but his willingness to apply his own common sense and sense of reality to an argument based on arcane and theoretical propositions. Competition law sometimes needs this.

2.1 What Are the Benefits of a Specialist Appeal Court?

Useful though these instances may be, there are equally strong arguments in favour of competition appeals being heard by specialist judges. In essence these are, first, that competition, being so extensively reliant on economics, differs from commercial or financial law; secondly, that familiarity with the specialised concepts and language is very helpful, that the development of expertise discourages specious arguments; thirdly, that a specialised body may be better placed to manage cases and speed up process; and finally, that it is better able to understand and gauge the effect of its decisions in the context of the competition enforcement system.¹⁵

Competition law relies heavily on economics for its purpose and for its content. Its rules about cartels and abuse of market power are derived from economics-based observations that such practices are harmful. Judging, for example, how what may seem like a simple rule that cartels are prohibited should be applied to particular circumstances requires skill, knowledge and experience. The same goes for abuse of dominant position – considering the beneficial or harmful effects of monopoly power, potential market entry, or pricing practices by dominant firms are not easy tasks for the uninitiated. A specialist court stands a better chance of getting these judgments right, and of appreciating both the power and the limitations of economic

¹³ Ibid paragraphs 47–49.

¹⁴ Ibid, paragraph 51.

¹⁵ See also Barling J's decision in *Sainsbury v Mastercard* 2015] EWHC Civ 3472 (Ch) to transfer the action from the High Court to the CAT for a discussion of the merits of the CAT as a specialist tribunal.

analysis. It is not just a question of complexity, mastering that is not the unique preserve of competition law specialists, but of the need to take careful account of the principles and practice of another discipline.

A specialist court is clearly better placed to understand technical jargon, and to know when a specious argument is being advanced. Indeed, the advantage of specialised knowledge lies as much in the ability to dismiss bad arguments easily as to examine good ones with understanding.

Then there is process. In the case of the CAT there are benefits in swifter case management, continuity of decision making and approach to evidence. These derive from the particular constitution of the CAT and are an integral part of its specialised nature. The CAT benefits from having an expert staff and continuity of decision making through the single docket approach, whereby a case is assigned to a panel of three members who handle the case from start to finish. The CAT's familiarity with the subject matter helps it actively to manage the case, identify the key issues and order witness evidence as necessary. A good example of this was in the speedy handling of the appeal brought in 2008 by the *Merger Action Group* against the Secretary of State's decision to allow the take-over of HBos by Lloyds' Bank, against the advice of the competition authority.¹⁶

On the need to deal with economics and economists, the CAT can call on members with academic or business experience of economics, making it easier to assess expert evidence.¹⁷ One particular benefit has been in arranging for expert economists to give oral evidence at the same time (in a so-called "hot tub") under the supervision of the CAT, normally using the services of an expert economist panel member.¹⁸ In a system which is predominantly adversarial, this is a useful, developing, technique. We will return to the effects of the adversarial system a little later.

Finally, there is the awareness of context, which is perhaps the most important consideration for this paper. It is this factor which probably decides the argument between using specialist and non-specialist competition courts. It is hard to deny that its specialised nature and experience mean that when a case comes before it, a specialist body such as the CAT is better placed to judge the effect of its decision not only on the parties before it, but the likely effect on similar cases in the future, and on related issues across the competition law spectrum.

Of course in one sense, every court has to bear these effects in mind. The point is not that the CAT will do so to a greater extent than a general court, but that it has the knowledge that is needed to make the correct assessment.

¹⁶ *Merger Action Group v SoS for Business, Enterprise and Regulatory Reform* [2008] CAT 36. The case took 12 days from registration to judgment. A recent innovation is the "fast track" procedure, under which costs and witness evidence can be restricted and a fixed time set for the case to come to trial. See *Breasley Pillows* [2016] CAT 8 and *Socrates v Law Society* [2017] CAT 10.

¹⁷ The CAT currently has some 32 Ordinary (non-judicial) Members, including professional lawyers, accountants and economists drawn from throughout the United Kingdom.

¹⁸ The general courts use this procedure also, but the questioning of expert economists is not an easy task for a non-specialist judge.

We saw earlier in the *BAA* litigation that the CAT had clearly in mind in the first of its judgments¹⁹ the implications of quashing the Commission's decision. It had indeed been reminded of the consequences for the administration of the market investigation system and of the care and thoroughness with which the investigation under review had been conducted. Despite these considerations, it felt compelled to act as it did, in the wider interests of justice.

Nevertheless, there is no reason to think that, on a question going to the interests of justice, a non-specialist judge would not have come to exactly the same conclusion on the evidence as presented, even if he or she were less knowledgeable than were the CAT judges about the inner workings of the Enterprise Act 2002.

The CAT's second *BAA* judgment is illuminating on this point. Here the applicant argued strongly that the Commission had, in restating its earlier conclusions despite a change of circumstances, failed to take various important matters into account; that there were some internal inconsistencies in the new decision; and that, in ordering divestment with insufficient regard to market circumstances, it had acted disproportionately. The CAT's judgment, however, stressed the need to read the Commission's lengthy decision as a whole, to have regard to the statutory context, and to examine the extent to which the Commission had carried out its duties to examine and assess in a case of public importance. It was not, however, for the CAT to "second guess" the Commission's conclusions, or to "trawl through [the decision] with a fine-tooth comb looking for errors."²⁰

This case is usually taken as a seminal statement of the CAT's judicial review role, in contrast to its ability in competition law infringement cases to hear an appeal "on the merits", but it was also a judgment that showed a deep understanding of the overall context, that is to say what the Commission's role was in the statutory scheme, and what it was seeking to achieve in this case. To set its decision aside for a second time would have dealt a major blow to the market investigation system. That would not in itself have justified deciding the case in favour of the Commission if other factors did not also justify it. But it was a relevant consideration. Whether it weighed as a factor in the CAT's mind is for others to say, but what we can say is that the CAT was better placed to appreciate and assess that factor than a general court might have been.

2.2 *Further Appeal Processes*

A controlling factor in this debate is, of course, the role played by the higher appeal courts, in the UK's case the Court of Appeal, and its Scottish and Northern Irish equivalents, and the Supreme Court. Such courts are by their nature generalist, but hear appeals from specialist bodies as well as from the general courts.

¹⁹ *BAA Ltd v Competition Commission (No 1)* loc cit.

²⁰ *BAA Ltd v Competition Commission (no 2)* [2012] CAT 3.

Both the Court of Appeal and the Supreme Court have not hesitated to engage with the essence of competition law.²¹ But both have acknowledged the specialist expertise of the CAT and the need for some restraint in consideration of its decisions. Thus, in considering the CAT's ruling on whether to allow a competition appeal out of time, the Court of Appeal (per Vos LJ) said:

Both sides have referred to us the well-known line of authority to the effect that appeal courts should approach appeals from expert tribunals with an appropriate degree of caution, because it is probable that in understanding and applying the law in their specialist field, the tribunal will have got it right...I have certainly borne these cautions well in mind in considering the appeal in this case.²²

Similarly, the Supreme Court, in deciding the issue whether a complex set of facts gave rise to a merger situation within the statutory definition, and on which both the CMA and the CAT had ruled, said:

This court has recently emphasised the caution which is required before an appellate court can be justified in overturning the economic judgments of an expert tribunal such as the Authority and the CAT.²³

Perhaps that is the best of all worlds; a specialist competition tribunal with further control exercised by general appeal courts, exercising an appropriate degree of caution.

2.3 *The Adversarial System*

We need to consider briefly the possible effect of the adversarial system on the judge's ability to assess the wider context.

In deciding a competition appeal, under the adversarial system practised in the UK and other common law jurisdictions, the judge's task is in essence to decide between the competing arguments that are put to him or her. This has the clear advantage of avoiding much unnecessary judicial enquiry, as this task is effectively delegated to the advocates of the various parties, and it serves to narrow down the issues in dispute and focus attention on them. This applies as much to the written pleadings and presentation of evidence as it does to the oral argument stage, to which much importance is attached.

In the CAT's case, there is a specific statutory requirement to decide the case "having regard to the grounds of appeal"²⁴ advanced by the appealing party or parties.

This seems eminently sensible and serves as a counter to those critics of the CAT's role, who point to the risks and waste of a complete re-trial of the matter

²¹ As with the case of *Courage v Crehan*, referred to earlier.

²² *Office of Fair Trading v Somerfield Stores Ltd* [2014] EWCA Civ 400, para. 25.

²³ *Société Coopérative de Production Seafrance SA v CMA* [2015] UKSC 75, para. 44.

²⁴ Para 3 of Schedule 8 to the Competition Act 1998.

already decided by the competition authority. There is no re-trial; instead, as the CAT itself has emphasised on many occasions, it reviews the decision "through the prism of the specific errors that are alleged by the appellant".²⁵

However, it is possible that the parties may have different interests in the outcome of a particular appeal than the needs of pure "justice" might suggest. In a cartel case, for example, they might prefer not to dwell on the details of cartel activity that they cannot easily deny and instead to concentrate their appeal on possible errors of assessment by the authority, or on an aspect of their conduct which is not as bad as the remainder. In a case of an appeal against a finding of an abuse of a dominant position, there may equally be a strong wish to avoid too detailed an examination of the market, as it might confirm that dominance exists, or of some aspects of the parties' conduct, as it might indeed show abuse.

Apart from limitations derived from these different motivations, the judge is necessarily going to have to decide the appeal on the basis of the evidence that is advanced, which may be insufficient to allow a complete appreciation of the market conditions in which the infringing conduct is alleged to be taking place. This is not quite the same as considering the wider implications of a particular decision, but market conditions are an essential part of the context of any reliable competition law decision. The CAT judges, as can any judge, may of course ask questions of counsel, and suggest further areas that may need to be examined. They may put propositions that they would like addressed. And, as we have seen, they can hold "hot tub" expert evidence sessions. But it is extremely difficult for a judge in an adversarial situation to change the direction of a case into something quite different from what the parties want to argue.

Surely, it is said, the CAT has the power itself to order evidence to be obtained and to summon witnesses, if it is not satisfied with what is before it. This is true to a certain extent,²⁶ but there are severe practical limits to the CAT's inquisitorial powers, and it is likely that any serious attempt by the CAT to conduct an inquiry in a case that was independent of the issues put before it by the parties would be speedily corrected by the Court of Appeal.

This may also apply in more inquisitorial systems, where it remains the responsibility of the appeal court to hear the case that is appealed to it, not some other case. But the adversarial system points up the dilemma particularly acutely; the court hears largely what the parties want it to hear, and has to decide accordingly. In this sense, the adversarial system is a further pressure on the judge, even the specialist competition judge, to concentrate on deciding the case in hand rather than to consider the wider market or more general context, as the necessary evidence may not be available.

²⁵ See e.g. *BT v OFCOM* [2010] CAT 17, para. 76.

²⁶ See the CAT's Rules of Procedure 2015 Rule 19(2) and (3) which provide for the appointment of experts by the Tribunal and the provision to the Tribunal of submissions, information and documents. How far it is able to make use of these powers will depend on the skill, experience and aptitude of the members of the particular Tribunal panel.

3 The CAT and Full Merits Appeals

We have, as it were, so far skirted round the central question. We have considered the origins of the need to do justice regardless of the consequences and the possible dilemma this creates; how this may apply particularly in a specialised field of law like competition law; whether specialist courts are better able to deal with the dilemma than the general courts; and we have discussed some examples. But we have not looked at how the CAT, as a specialist competition court, approaches a mainstream “on the merits” appeal against a competition authority decision. Does the CAT see itself as part of the overall competition system, approaching its role with that context in mind, or does it simply decide the case as put before it and leave someone else to work out the consequences?

The answer, as may be imagined, is “both” or possibly “neither”, for the dilemma is a false one. Clearly the CAT has to decide the case before it *and* consider the possible consequences of its decision. The CAT’s distinctive contribution lies in its ability to navigate through this particular minefield.²⁷

We have alluded earlier to the need to avoid a complete retrial and to decide the case through the prism of the errors complained of. These requirements derive from the statute, but their implementation relies very much on the CAT’s experience of merits appeals. A further requirement is to have regard to the exercise of regulatory judgment by an authority, where the authority’s experience may be superior even to the CAT’s own.²⁸ This has been litigated extensively, mainly in cases involving the communications regulator, the Office of Communications (“Ofcom”),²⁹ rather than the competition authorities, the Office of Fair Trading (the “OFT”) and its successor, the Competition and Markets Authority (the “CMA”). This is relevant only to the extent that a specialist regulator is more likely to have policies for its sector by reference to which it makes value judgments; the principle is equally applicable to mainstream competition law.

In these cases, it is clear that the CAT will respect value judgments made on the basis of what it sees as the right considerations and will not normally substitute its own view, even if this is different. In the *Pay TV no 1* case³⁰ the CAT set out its

²⁷ Note that the decision itself may go some way to address the immediate consequences. Whilst in judicial review, the normal outcome is quashing and remittal to the authority, the CAT may also do this in full merits cases, rather than substitute its own decision, where it believes that the original decision may be valid in essence or in part but requires further work to ground it. See the CAT’s approach in *Aberdeen Journals no 1* [2002] CAT 4.

²⁸ These value judgments may also be reflected in guidance to which the CAT must have regard, for example in relation to penalties.

²⁹ See e.g. *Telefónica 02 UK Ltd v BT* [2012] EWCA Civ 1002 (Court of Appeal – the *08 Numbers* case), *BSkyB v OFCOM* [2012] CAT 20 (*Pay TV no 1*) and *BT v OFCOM (Ethernets)* [2014] CAT 14. The CAT is expressly not to be regarded as “a fully equipped duplicate regulatory body waiting in the wings just for appeals.” per Jacob LJ in *T-Mobile (UK) Ltd v OFCOM* [2008] EWCA Civ 1373.

³⁰ *BSkyB v OFCOM* [2012] CAT 20.

approach particularly clearly, and this was a case where the regulator was using its licensing powers to enforce competition, so may be seen as a regulatory/competition law hybrid. The CAT made it clear that it could review legality, fairness and rationality, as with judicial review, but in addition it had to decide whether the decision appealed against was "wrong". This involved careful consideration of the decision itself and of the evidence and reasons underlying it, allowing an appropriate margin of appreciation to a specialist authority, and on matters of regulatory judgment, an appropriate degree of restraint. Nevertheless, where the CAT was satisfied the decision was wrong, it would overturn it.

...(T)he specific language of [the statute] ...and the duration and intensity of the investigation carried out by Ofcom as a specialist regulator, are clearly important factors, along with the nature of the particular issue and decision, the fullness and clarity of the reasoning and the evidence given on appeal. Whether or not it is helpful to encapsulate the appropriate approach in the proposition that Ofcom enjoys a margin of appreciation on issues that entail the exercise of its judgment, the fact is that the Tribunal should apply appropriate restraint and should not interfere with Ofcom's exercise of a judgment unless satisfied that it was wrong.³¹

It is fair to say, however, that in practice it is just as likely that the challenge will arise not so much in relation to any value judgment made by the competition authority, but in relation to the factual elements on which that judgment is based. In these situations, the CAT will be prepared to intervene and correct what it sees as error.

In the cases where the CAT has overturned a competition authority infringement decision,³² these considerations have been very apparent. In the *Tobacco Cartel* case³³ the CAT quashed the OFT's tobacco pricing finding against the applicants because the evidence put forward by the OFT did not support the decision. In the *Cheese Cartel* case³⁴ the CAT overturned in part a decision of the OFT finding that Tesco had taken part in a concerted practice relating to cheese, again on the basis of the evidence put forward to defend the decision.

Finally, in the *Pay TV no 1* case,³⁵ the CAT overturned Ofcom's decision because it did not agree with the assessment made by Ofcom of the evidence that BSkyB was engaging in exclusionary practices in relation to premium sports television. In other words, the CAT thought the decision was wrong. As with *BAA* and airports, this decision had considerable ramifications³⁶ and a tribunal concerned mainly to

³¹ Ibid, para 87.

³² Full merits appeals against competition authority decisions in the UK have in the past been relatively few, although that the trend is increasing as the CMA takes more competition infringement decisions.

³³ *Imperial Tobacco Group PLC and others v OFT* [2011] CAT 41.

³⁴ *Tesco Stores Ltd v OFT* [2012] CAT 31.

³⁵ *BSkyB v Ofcom* [2012] CAT 20 (*Pay TV no 1*). We have noted this was a regulatory/competition law hybrid case.

³⁶ The direct consequences included an appeal to the Court of Appeal, a remittal to the CAT, disputes about the composition of the remittal panel, appointment of a new case Chairman, a settlement, a further decision by Ofcom and an appeal against that decision to the CAT, a further CAT decision, and an appeal to the Court of Appeal that was then discontinued. The indirect consequences

uphold the enforcement system would surely not have decided the case in this way. But having examined the evidence carefully, the CAT dispensed what it saw as justice “*ruat caelum*”.

4 Conclusions

From this discussion of the role of the specialist competition law judge, working in specialist tribunals and in particular in the CAT, we may conclude as follows:

First, the need to do justice in the individual case, exemplified in the maxim “*Fiat Justitia ruat caelum*”, is a good starting point for any judge, even in a specialised field, where context is important, whether this is the market background to the particular dispute or the wider implications of the decision for competition law itself and for its enforcement system.

Secondly, however, the maxim does not entitle a judge to ignore issues of context or to ride roughshod over the delicate architecture and operating norms of competition law. A decision that ignored essential parts of current doctrine or that flew in the face of basic economic principles could not be allowed to stand.

Thirdly, a specialist tribunal, comprising judges with specialist competition knowledge and experience is more likely to strike the right balance between case and context than its non-specialist equivalent.

Fourthly, in the UK context, the CAT is a useful example of how this situation can best be handled. Whilst there are subtle differences between its approach in judicial review cases from that in full merits appeals, the task is in essence the same, namely to apply its competition expertise to expert judgments made by competition authorities and to take appropriate action where needed.

Finally, in taking such action, it is best placed to appreciate not only the utility (or futility!) of any substantive decision it takes, but also the wider consequences of that decision.

It may be noted as a post script that an appreciation of the context and consequences of any appeal decision may not always point, as might otherwise be thought from the examples we have quoted, to greater leniency towards an authority or to a tendency to uphold the decisions of competition authorities for the sake of the system. In some cases wider imperatives may point to a harsher approach, and a decision being overturned, having regard amongst other things to the need to safeguard the integrity of competition law as a whole.

So, as we noted at the start in relation to Lord Mansfield’s judgment in *R v Wilkes*, application of the maxim “*fiat justitia ruat caelum*” may lead to a condemnation as well as to an acquittal.

included a government review of the regulatory appeal system and a change in the standard of review applied to Ofcom decisions from full merits to judicial review. It is hard to see how the heavens could have fallen more comprehensively.

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Antitrust Courts and Economic Findings in Germany



Andreas Mundt

1 Introduction

In his scholarly publications, Carl Baudenbacher covered an impressive scope of different topics in the field of international economic law, while a specific focus of his publications is directed toward competition law. Thus, a contribution to this *Liber Amicorum* has good reasons to elaborate on the *Art of Judicial Reasoning* in the field of competition law. One of the most interesting questions in that regard is the way that courts handle economic findings when adjudicating in antitrust proceedings.

The interest in the role of economic findings in antitrust proceedings was particularly fuelled by the so-called “*more economic approach*”, which the European Commission announced around 15 years ago.¹ National competition authorities also intensified their efforts to base their decisions on sound economic findings. For example, the Bundeskartellamt established within its General Policy Division a separate Unit for Economic Issues in Competition Policy in 2007 and a separate Unit for Data Analysis and Econometrics in 2014, which both report to a Chief Economist.² Additionally, the increasing availability of data and modern technology make possible economic analyses that are much more sophisticated than in former times, particularly in the field of empirical economics. Particularly the latter development made it even more attractive also for private parties to employ economic findings in private or public proceedings concerning antitrust law.

This increased use of economic findings also lead to lively scholarly discussions. It is not surprising that the position of the contributions to that discussion are influenced, to a certain extent, by the scholars’ role, background and education:

President of the German Federal Cartel Office (*Bundeskartellamt*).

¹ See inter alia LarsHendrik Röller and Friederiszick (2005), p. 353.

² Ewald (2010).

A. Mundt (✉)

German Federal Cartel Office (Bundeskartellamt), Bonn, Germany

Economists on the one hand demand a better integration of economics into the reasoning of (judicial) decisions and also point to a duty of lawyers to develop a better understanding of competition economics.³ While lawyers acknowledge the increasing relevance of economic expertise⁴ (and “perceive economic training as beneficial”⁵), they stress on the other hand that “lawyers have to remain in the driver’s seat when applying antitrust law.”⁶

Against this background, this contribution will discuss the state of the relationship between lawyers – who occupy the driver’s seat principally due to their role while adjudicating – and economists, who increasingly gain importance in antitrust proceedings before courts. As the relationship between lawyers in the role of judges and economists is significantly dependant on the applicable legal framework, this contribution focuses on the situation in Germany.⁷

In the following, this contribution describes the pragmatic approach of German competition law judges with complex economic issues and their way of implementing economic findings into judicial proceedings. Therefore, it starts with a description of the sources and subjects of economic findings (see Sect. 2). It then shows the scope judges have under German law for the implementation of these economic findings into their proceedings (see Sect. 3) and how the judges make use of that scope in practice by depicting some proceedings that are exemplary for recent developments (see Sect. 4). The contribution concludes that judges remain in the “driver’s seat” when adjudicating in antitrust proceedings, but that they are increasingly supported by economists sitting next to them on the front passenger seat.

2 Sources and Subjects of Economic Findings

The introduction of economic findings into judicial proceedings has been referred to as “forensic economics”,⁸ which may be characterised as a subdivision of the wider area of “law and economics”.⁹ The term “forensic economics” is used to describe the process of generating economic findings at a first stage by applying scientific methods and then introducing these findings into the judicial proceedings at a second stage.

³ Compare Ewald (2011), p. 46.

⁴ Compare for instance Pohlmann (2013), pp. 435, 437.

⁵ Baye and Wright (2011), p. 4.

⁶ Zimmer (2012), p. 525; compare also OECD (2008), p. 9.

⁷ See for instance the following publication with a focus on the US: Baker and Bresnahan (2008), p. 1.

⁸ Ewald (2011), p. 22 ff.; compare also Pohlmann (2013), pp. 435, 439; Strohn (2014), p. 117.

⁹ Compare Zimmer (2012), p. 525.

When introducing economic findings into judicial proceedings, it is crucial to enable the judges to understand these findings.¹⁰ Hence, the economic findings have to be shaped in a way that they “translate” the scientific derivation of their hypotheses in order to allow lawyers and particularly judges to conduct the legal assessment of a specific case.¹¹ In that regard, judges have expressed the reasonable demand for a comprehensible phrasing of economic opinions including a consolidated, verbal explanation of the key findings.¹²

A basic requirement for the consideration of economic findings is the application of established or at least well-reasoned scientific methods.¹³ It is helpful in this context to distinguish in principle between theoretical economics (see Sect. 2.1) and empirical economics (see Sect. 2.2).¹⁴ Although it is not always possible (or indeed necessary) to separate these two sources of economic findings in practice, they both fulfil a specific function that justifies a separate depiction.

2.1 *Theoretical Economics*

The term theoretical economics describes the process of establishing economic findings by means of theoretical reasoning. The resulting hypotheses can then be applied to the case at hand and thus used to answer specific questions which arise in the course of a court’s legal assessment. Therefore, an economic model has to be set up that is based on industrial and competition economics and facilitates the application of legal provisions to the facts of the respective case.¹⁵

For this purpose, the economic model does not claim to represent reality in full detail. Instead, it employs simplifying assumptions to focus the attention on the details that are relevant for the specific case. Such simplified assumptions make it possible to draw conclusions that contribute, for instance, to the market delineation or the theory of harm: First, this approach allows for the assessment of particular cause-and-effect relations in isolation. Second, it additionally allows the gradual variation of assumptions in order to identify the relevant factors that influence the outcome of the model.¹⁶

¹⁰For the process of introducing economic findings into administrative proceedings at the Bundeskartellamt, the Bundeskartellamt has published “Best practices for expert economic opinions” (available in English at www.bundeskartellamt.de) in order to ensure the comprehensiveness of economic opinions that are regularly submitted to the Bundeskartellamt.

¹¹Ewald (2011), p. 25; Pflanz (2012), pp. 69, 73; Kirchhoff (2014), pp. 521, 528. Compare also the Bundeskartellamt’s ‘Best practices for expert economic opinions’, p. 2 f. for the introduction of economic findings into administrative proceedings.

¹²Kirchhoff (2014), pp. 521, 528.

¹³Compare the Bundeskartellamt’s “Best practices for expert economic opinions”, p. 4 f. for the introduction of economic findings into administrative proceedings.

¹⁴Ewald (2011), p. 22 ff.; compare also Strohn (2014), p. 118 ff.

¹⁵Ewald (2011), p. 25.

¹⁶Ewald (2011), p. 26.

That variation of the underlying assumptions of an economic model does not only improve the number of possible conclusions, but also permits an assessment of the so-called “robustness” of the model: The lesser the effect of changes in the assumptions on the outcome of a model, the higher is the robustness of the model.¹⁷ In principle, a higher degree of robustness increases the probative value that the model has for a competitive assessment. This is crucial to achieve the necessary level of certainty to employ the model when reasoning a judicial decision.¹⁸

2.2 *Empirical Economics*

Economic findings can also be generated by employing empirical methods to real-world data and are then referred to as “empirical economics”. The aim of empirical economics is either to allow for self-contained conclusions regarding the circumstances of a specific case or to support the findings of a theoretical economic model.¹⁹ In the latter case, theoretical and empirical economics complement each other which may increase the plausibility of economic findings that are meant to be used in judicial proceedings.

The basis for the application of empirical economics is a data set containing existing data or data that is specifically collected for the particular case. Although the quality of the data set pre-determines the quality of the subsequent analysis, it is rarely possible to find an existing data set or to generate a new data set that is perfectly accurate and suited for the necessary analysis in the particular case. While increased efforts spent generating the data set may make it more accurate, the available resources for the necessary investigative measures are usually limited (both for antitrust authorities and private undertakings). Additionally, a higher accuracy may lead to a more complex data set that will also require additional efforts to be expended when being analysed.²⁰

As the data that is available, or that can be generated with reasonable efforts, is usually not “perfect” and does not allow strict and compelling conclusions to be drawn, the primary function of empirical economics is to find a solution for what economists call the “problem of identification”.²¹ A sound empirical economic finding has to “identify” which interpretation of empirical data is more plausible than other possible interpretations (the existence of multiple, diverging interpretations is a common situation in a judicial proceeding).²² Hence, the analysis of the data – which may be conducted through many different methods ranging from simple

¹⁷ Bundeskartellamt, ‘Best practices for expert economic opinions’, p. 5 f.

¹⁸ Compare Kirchhoff (2014), pp. 521, 528.

¹⁹ Bundeskartellamt, ‘Best practices for expert economic opinions’, p. 6.

²⁰ Ewald (2011), p. 36.

²¹ Baker and Bresnahan (2008), pp. 1, 3; Ewald (2011), p. 34.

²² Baker and Bresnahan (2008), pp. 1, 5; Ewald (2011), p. 34 ff.

descriptive statistics to complex econometric methods²³ – has to address the identification problem and explain why the data analysis is suitable to distinguish between competing theories concerning the case.²⁴

3 Scope of the Judicial Review in Germany

However, economic findings of the type described above may only be of relevance in judicial proceedings within the scope of judicial review. That scope – and consequently also the relevance of economic findings – differs significantly between fine proceedings (see Sect. 3.1), administrative proceedings (see Sect. 3.2) and civil law proceedings before German courts (see Sect. 3.3).

3.1 *Fine Proceedings*

Judicial fine proceedings take place when the undertakings or individuals concerned appeal a competition authority's decision. Under German competition law such appeal does not trigger a "review" of the authority's decision but leads to a *de novo* assessment of the facts that is independent from the outcome of the authority's proceedings. While the former decision still has the function of being the indictment at the beginning of the proceedings, the process of taking of evidence is restarted.

Although it is possible, in principle, that economic findings gain some relevance in that procedural situation, it is rather unusual that this happens in practice. The judges will usually focus on taking and evaluating evidence that is able to clarify the infringement of competition law. As in most cases where a fine is an appropriate remedy a rather "plain" conduct and theory of harm stand in question (particularly as to hardcore cartels where no effects have to be proven), it is usually neither necessary nor helpful to spend too much time or efforts on complex economic findings. Additionally, fine proceedings have strict rules regarding the taking of evidence that at least complicate the taking of economic findings into account.²⁵

One of the few exceptions under German competition law is the disgorgement of the economic benefit of an infringement of competition law through the competition authority or the court that may require economic findings. However, that disgorgement of economic benefits – which is by now an option and no longer an obligation of competition authorities – had no significant practical relevance in the recent past.

²³ Bundeskartellamt, 'Best practices for expert economic opinions', p. 6.

²⁴ Baker and Bresnahan (2008), pp. 1, 5.

²⁵ Compare Kirchhoff (2014), p. 521.

3.2 *Administrative Proceedings*

In administrative proceedings, the court of appeal has to review the decision of a competition authority. If that competition authority has employed economic findings to reason its decision or has rejected economic findings brought forward by the parties, the judges will have to decide whether the authority's assessment of the economic findings was correct. Additionally, the parties may bring forward new economic findings during the appeal proceedings that the court will have to take into account.

Typical scenarios (under German law) include decisions in merger control cases that have been based inter alia on analyses performed by the Bundeskartellamt's Chief Economist team.²⁶ Another example are cease-and-desist-orders that reject economic submissions by the parties regarding the definition of the market²⁷ or the restricting effects of certain contractual clauses on competition.²⁸

3.3 *Civil Law Proceedings*

Economic findings today are also of significant relevance in civil law proceedings, notably those concerning the private enforcement of damages which has an ever increasing importance in Germany. The determination of the amount of damages, in particular, will regularly require economic findings.

Typically, the parties themselves will bring forward economic findings that support their position. The court then has to decide whether these findings are relevant for the legal assessment of the case and, if so, whether and which of the (most likely diverging) findings of the litigant parties is correct. It is also possible that the court considers certain aspects of the case to be still unclear (for example, because the opinions brought forward by the parties are insufficient) and thus require further efforts to illuminate the circumstances of the case, which could result in the appointment of an independent expert (see below, Sect. 4.3).

4 **Economic Findings in the Case Law of German Antitrust Courts**

Antitrust courts in Germany have increasingly considered economic findings in their proceedings. While there are several procedural ways of taking economic findings into account, courts have employed certain ways more often than others.

²⁶ See for example Bundeskartellamt, case B2 – 96/14, decision of 31 March 2015, p. 64 ff. (regarding the delineation of the product markets), p. 71 ff. (regarding the geographical delineation) and p. 87 ff. (regarding the closeness of competition).

²⁷ Bundeskartellamt, case B9 – 66/10, decision of 20 December 2013, pp. 34, 39 ff.

²⁸ Bundeskartellamt, case B9 – 121/13, decision of 22 December 2015, p. 78 ff.

Courts may base their legal assessment on general economic judgments derived from experience (see Sect. 4.1), take into account the opinions of experts commissioned by the parties (see Sect. 4.2) or by the court (see Sect. 4.3) or consult competition authorities that are entitled to act as *amicus curiae* in antitrust proceedings (see Sect. 4.4).

4.1 General Economic Judgments (“ökonomische Erfahrungssätze”)

The most direct way for a court to integrate economic considerations into judicial proceedings is to revert to general economic judgments (“ökonomische Erfahrungssätze”) that allow conclusions on certain economic relationships. Such general economic judgments exist independently from the case at hand and rely on experiences from a larger number of comparable factual situations. In essence, they are the result of a reasonable sum of individual observations of economic processes that one generalises from in order to allow for abstract conclusions.²⁹

However, judges have pointed out that such empirical judgments have to be provable or at least logically compelling in order to be suitable as a sufficient basis of a judicial reasoning. There has been the claim not to introduce complex economic models or controversial economic theories into judicial proceedings by treating them as general economic judgments.³⁰ Thus, empirical judgments are suitable for judicial proceedings in two different categories that differ both in terms of scope and practical relevance:

Firstly, some more general empirical judgments exist for economic conclusions that are relevant in a huge number of situations and apply mostly irrespective of the specific circumstances of the case. Although such empirical judgments are very plausible because the underlying observations are apparent in many cases, they are also rather limited in number, as they require a minimum of comparability between cases that usually allows only for a few rather abstract conclusions.³¹

Among the general empirical judgments that are relevant in German case law are, for example, assumptions on the effects that a cartel usually has (such as an increased yield for the participating companies³² and a general increase in prices³³). Likewise, courts have accepted the assumption that a cartel affected a specific procurement transaction if that cartel concerned the relevant sector, geographical area

²⁹ Pohlmann (2013), pp. 435, 447.

³⁰ Kirchhoff (2014), pp. 521, 525 ff.

³¹ Compare Kirchhoff (2014), pp. 521, 525 ff.

³² BGH, case KRB 2/05, decision of 28 June 2005.

³³ OLG Frankfurt, case 11 U 73/11, decision of 17 November 2015; OLG Karlsruhe, case 6 U 204/15 Kart (2), decision of 9 November 2016; LG Hannover case 18 O 405/14, decision of 5 July 2016; LG Frankfurt, case 2-06 O 464/14, decision of 30 March 2016; LG Dortmund, case 8 O 25/16 (Kart), decision of 28 June 2017; LG Hannover, case 18 O 194/15, decision of 2 July 2017.

and period of the transaction.³⁴ A commonly acknowledged empirical judgment also relates to the effect of an exchange of sensitive information between competitors, stating that such exchange will usually result in an adjustment of the competitors' market behaviour in accordance with the information received.³⁵ Finally, it is a generally accepted empirical judgment that a monopolist will usually set the price in order to maximise its profit and not according to marginal costs.³⁶

Secondly, certain empirical judgments are available as rather specific knowledge within a court that have its origin in the judges' (life) experience.³⁷ Although such empirical judgments are usually less complex and have a scope that is significantly narrower, they may still qualify as economic findings that are suitable for a solid judicial reasoning. Hence, one can find an increasing use of these empirical judgments in the recent German case law on antitrust matters (although the courts do not necessarily always label these as "economic findings"). That observation is particularly relevant for the decision-making bodies of the Federal Court of Justice (which is the court of the last resort in Germany) and the Higher Regional Court Düsseldorf which are specialised in antitrust proceedings. These courts command a long-standing experience of proceedings dealing with commercial matters and their judges are very experienced in the appraisal of economic findings.

For example, the German Federal Court of Justice recently referred to an empirical judgment from its experience in a case that concerned an abusive behaviour by a large grocery chain that exerted its superior buyer power vis-à-vis its suppliers. The Federal Court of Justice found that, according to its experience, merchants assess the profitability of a certain commercial transaction by taking into account the sum of all of their own and their business partner's reciprocal obligations (and not just the value of an isolated obligation that is part of the transaction).³⁸

Furthermore, the Higher Regional Court Düsseldorf referred to its experience when adjudicating that not all grocery stores within a large city (Berlin) compete with each other, as customers would not travel the necessary distances to benefit from cheaper prices of grocery stores in other parts of the city.³⁹ The same court also found that its experience justified a conclusion according to which a customer usually books through the hotel booking platform that offers him the best conditions for comparable offers.⁴⁰ Additionally, it also found that experience supported the finding that hotels would not undercut the prices on their own website when offering

³⁴ LG München, case 37 O 24526/14, decision of 27 July 2016.

³⁵ BGH, case KZR 31/14, decision of 12 April 2016 with reference to ECJ, case C-8/08, decision of 4 June 2009 (T-Mobile Netherlands); see also OLG Düsseldorf, case VI-U (Kart) 20/14, decision of 12 July 2017.

³⁶ LG Düsseldorf, case 14d O 4/14, decision of 19 November 2015.

³⁷ See for instance BGH, case KVR 12/06, decision of 16 January 2007; Nothdurft (2008), pp. 285, 299; Kirchhoff (2014), pp. 521, 530.

³⁸ BGH, case KVR 3/17, decision of 23 January 2018.

³⁹ OLG Düsseldorf, case VI-Kart 5/16 (V), decision of 23 August 2017.

⁴⁰ OLG Düsseldorf, case VI-Kart 1/14 (V), decision of 9 January 2015.

their rooms through hotel booking platforms, which may impede competition among hotel booking platforms.⁴¹

4.2 *Expert Opinions Commissioned by the Parties*

However, in many cases it will be necessary to go beyond abstract general economic judgments and generate economic findings that are specifically targeted at the circumstances of the particular case. In such cases, the parties increasingly submit economic opinions by experts that they have commissioned – both to complement or to oppose relevant empirical judgments.⁴²

The legal status of such expert opinions varies depending on the type of the proceedings: expert opinions commissioned by the parties do not constitute any form of evidence and thus have no practical relevance in fine proceedings in which the procedural rules on evidence are quite strict. By contrast, while expert opinions (only) constitute mere submissions by the parties under German law (“*Parteivortrag*”) whether in administrative⁴³ or civil law proceedings,⁴⁴ the relevance in such proceedings is nevertheless higher. Once a party submits an expert opinion, the court will at least have to consider it in the reasoning of the decision provided that it is at least potentially relevant for the particular case.⁴⁵

In practice, this procedural requirement has led to several court decisions with a reference to expert opinions submitted by the parties (some of which are described in the following in a non-exhaustive manner). However, the opinions influenced the courts’ decision in substance only very rarely. For example, a court recently relied on an expert opinion submitted by a TV broadcaster to quantify the profit that a cable network operator earned from distributing the broadcaster’s content via the cable network.⁴⁶

In several other cases, the courts concluded that the opinions submitted by the parties are irrelevant and thus not able to speak in favour of the party. In one case,

⁴¹ OLG Düsseldorf, case VI-Kart 1/16 (V), decision of 4 May 2016; see also LG Köln, case 88 O (Kart) 17/16, decision of 16 February 2017 which followed that ruling.

⁴² Meaningful figures are only available for the administrative proceedings at the Bundeskartellamt, which received about 25 expert opinions as the submissions of companies in 2015 and 2016 (see Bundeskartellamt, Activity Report 2015/2016, p23). See also (albeit without concrete figures) Kirchhoff (2014), pp. 521, 527.

⁴³ Nothdurft (2008), pp. 285, 296.

⁴⁴ BGH, case IX ZR 314/14, decision of 9 June 2016.

⁴⁵ In civil law proceedings, the court will usually have to work towards a further clarification of the facts if an expert opinion submitted by a party contradicts the submissions of the counterparty or even the findings of an opinion of an expert appointed by the court, BGH, case VII ZR 36/15, decision of 17 May 2017. In administrative proceedings, the court usually has to show that it considered the opinion when adjudicating in order to grant the right to be heard, compare BVwerG, case 9 B 76/10, decision of 3 August 2011.

⁴⁶ OLG Düsseldorf, case VI-U (Kart) 15/13, decision of 8 March 2017.

the expert opinion submitted by the party was considered irrelevant as the party had failed to submit the facts underpinning the opinion in accordance with the applicable procedural rules.⁴⁷ In other cases, the courts have rejected expert opinions submitted by the parties on account of the counterparties' substantiated replies that challenged the validity of the opinions.⁴⁸ Furthermore, courts have found that the expert opinions' were overly abstract and thus that they lacked informative value regarding the specific circumstances of the proceedings.⁴⁹ Finally, a court disregarded two expert opinions because one was not consistent with "everyday reality,"⁵⁰ and the other *inter alia* because it contained several findings that were insubstantial.⁵¹

4.3 *Expert Opinions Commissioned by the Court*

Alternatively, the court itself may also appoint an expert if it holds that necessary to adjudicate the case. Such a court appointed expert could deliver his opinion in a neutral and objective way that may improve the credibility of the economic findings contained in the opinion.⁵² However, antitrust courts in Germany have seldomly used that option (at least apart from the estimation of damages in recent civil proceedings).

To a certain extent, this is a beneficial consequence of the parties' efforts, as they address economic aspects in the expert opinions that they commission,⁵³ or of the competition authority's efforts to integrate economic findings into the reasoning of its decisions (courts have also the competence to require the authority to conduct further investigations during an appeal proceeding). Additionally, the specialised judges that deal with antitrust cases in Germany have built up a significant body of economic knowledge, as they often deal with antitrust cases for many years.⁵⁴ This knowledge may enable them in particular cases to refrain from appointing an expert and to assess the economic circumstances of the case themselves, for example when evaluating the parties' contradicting submissions regarding the price setting of automobile manufacturers.⁵⁵ Finally, many questions that arise in antitrust proceedings

⁴⁷ OLG Düsseldorf, case VI-Kart 1/16 (V), decision of 4 May 2016.

⁴⁸ LG Dortmund, case 8 O 25/16 (Kart), decision of 28 June 2017; LG Frankfurt, case 2-06 O 464/14, decision of 30 March 2016.

⁴⁹ LG Hannover, case 18 O 194/15, decision of 2 May 2017; LG Dortmund, case 8 O 90/14, decision of 21 December 2016; also relevant in case LG Dortmund, case 8 O 25/16 (Kart), decision of 28 June 2017.

⁵⁰ OLG Düsseldorf, case VI-Kart 5/16 (V), decision of 23 August 2017.

⁵¹ OLG Düsseldorf, case VI-Kart 13/15 (V), decision of 5 April 2017.

⁵² With scepticism regarding the practical relevance Strohn (2014), p. 120.

⁵³ BGH, case KVR 3/67, decision of 27 June 1968; Nothdurft (2008), pp. 285, 298.

⁵⁴ Nothdurft (2008), pp. 285, 298 ff.

⁵⁵ LG Düsseldorf, case 14d O 4/14, decision of 19 November 2015.

concern either future or hypothetical developments – economic experts face the same challenges when trying to find answers to these questions as judges and often do not have any superior knowledge.⁵⁶

Consequently, the respective courts of appeal usually confirmed lower courts when these have declined a request by the parties to commission an expert opinion. The Federal Court of Justice has stated several times that a court was justified to adjudicate the case based on its sufficient knowledge regarding the economic circumstances that were relevant for its decision.⁵⁷ In two more recent cases, the courts rejected the requests to commission an expert opinion because the requesting parties did not specify sufficiently the possible efficiencies justifying an exemption from the ban on cartels in one case (as an expert opinion would thus have amounted to a “fishing expedition”)⁵⁸ and circumstances excluding a passing on of cartel damages in the other case.⁵⁹

Among the few concluded proceedings in which a court itself commissioned an expert opinion is a fine proceeding under a prior legal provision. That provision required the competition authority and the court to quantify the extra revenues that a company realised through a cartel in order to determine the magnitude of the fine. For that purpose, the court referred to an opinion that a neutral expert produced on behalf of the court following directions given by the court.⁶⁰ That expert opinion also gained a significant relevance in a civil law suit following the fine proceedings, as the court referred to that opinion instead of commissioning a new expert opinion in order to estimate the amount of damages caused by the cartel.⁶¹

The latter is also an (earlier) example for a general trend, as opinions of experts appointed by courts have an increasing relevance for other proceedings in the area of private enforcement as well. The huge difficulty when adjudicating such cases is the need to quantify the damages, even though the procedural law allows for estimates. Hence, courts increasingly commission expert opinions in order to come to a decision regarding the amount of damages.⁶² For example, regional courts have appointed experts to quantify the individual amount of damages in civil proceedings following the Bundeskartellamt’s decisions against cartels in the area of sugar⁶³ and

⁵⁶ Nothdurft (2008), pp. 285, 298 ff.

⁵⁷ BGH, case KVR 3/67, decision of 27 June 1968; BGH, case KVR 5/86, decision of 22 September 1987; BGH, case KVR 12/06, decision of 16 January 2007; compare also Nothdurft (2008), pp. 285, 295 ff.

⁵⁸ OLG Düsseldorf, case VI-U (Kart) 20/14, decision of 12 July 2017.

⁵⁹ LG Frankfurt, case 2-06 O 358/14, decision of 30 March 2016.

⁶⁰ OLG Düsseldorf, case VI-2a Kart 2 - 6/08 OWi, decision of 26 June 2009.

⁶¹ OLG Frankfurt, case 11 U 73/11 (Kart), decision of 17 November 2015.

⁶² Compare also LG Frankfurt, case 2-06 O 464/14, decision of 30 March 2016; OLG Karlsruhe, case 6 U 204/15 Kart (2), decision of 9 November 2016; LG Hannover, case 18 O 194/15, decision of 2 May 2017.

⁶³ LG Mannheim, case 2 O 149/15, proceedings pending; LG Mannheim, case 7 O 226/15 Kart, proceedings pending.

railway track superstructure like rails.⁶⁴ In another case, the court had appointed an expert but the parties settled the case before the expert could submit his opinion.⁶⁵

4.4 Consultation of *amici curiae*

Finally, a court may consult so-called *amici curiae* in order to benefit from economic knowledge and findings in civil law proceedings.⁶⁶ *Amicus curiae* is a person or institution with specific knowledge that is not party to the proceedings, but that a court may hear in order to utilise his specific knowledge.⁶⁷ German and European competition law contain explicit provisions that allow the European Commission and national competition authorities to participate in proceedings that concern anti-trust matters.⁶⁸

On that basis, the consultation of *amici curiae* gained a greater relevance in anti-trust law than in other areas of law.⁶⁹ While the European Commission makes use of its competence rather infrequently,⁷⁰ the Bundeskartellamt appears often as *amicus curiae* at least in proceedings before the Federal Court of Justice.⁷¹ Judges at the Federal Court of Justice have expressed that they attach great importance to the statements that the Bundeskartellamt gives as *amicus curiae*.⁷²

The legal and economic remarks of *amici curiae* are not binding and do not have the character of evidence. However, the parties to the proceedings may refer to the statement of the *amicus curiae* and hereby (formally) introduce it into the proceedings as a party's submission, which may trigger the court to take a stance on it in the reasoning of the decision.⁷³

⁶⁴ LG Stuttgart, case 11 O 269/14, proceedings pending.

⁶⁵ LG Stuttgart, case 11 O 338/13, proceedings closed and no decision published.

⁶⁶ Strohn (2014), p. 120 ff.; compare also Kirchhoff (2014), pp. 521, 530.

⁶⁷ Strohn (2014), p. 120.

⁶⁸ See sections 90 and 90a ARC.

⁶⁹ Compare Strohn (2014), p. 120 ff.

⁷⁰ Strohn (2014), p. 121 regarding the proceedings at the German Federal Court of Justice. As regards the *amicus curiae*, the European Commission intervened (only) 17 times in 12 years as *amicus curiae*, see AG Wahl, case C-671/15, opinion of 6 April 2017.

⁷¹ For example, the Bundeskartellamt made 12 submissions as *amicus curiae* in judicial proceedings in 2016, see Bundeskartellamt, Annual Report 2016, p. 12.

⁷² Strohn (2014), p. 121.

⁷³ Compare LG Frankfurt, case 2-06 O 458/14, decision of 24 June 2015.

5 Conclusion and Outlook

The example of German jurisprudence shows that economic findings become more and more relevant in antitrust proceedings. While often judges are able to refer to their experience in specialised courts, and to general economic judgments to assess the economic circumstances of a particular case, the increasing complexity of some cases also requires courts to take into account external knowledge.

However, that does not call into question the central role that judges have when adjudicating in antitrust proceedings. Particularly, they are not in danger of having to vacate the “driver’s seat” to economic experts. The practical application of antitrust law in court shows that judges retain control over their proceedings and at the same time acknowledge the need to develop an appropriate understanding of competition economics. They are able to decide appropriately from case to case as to how to handle economic arguments and expert opinions that the parties presented or economic issues that turn out to be relevant for the case.

For that purpose, judges may take into account or disregard economic analyses conducted by the competition authority or expert opinions presented by private parties. They have done so with different outcomes in a couple of cases. Additionally, they increasingly appoint neutral experts to deliver an opinion that helps their decision-making when the judges’ economic knowledge ends (particularly in proceedings regarding actions for damages). Finally, judges have found a beneficial way of taking into account the contributions that competition authorities are able to deliver when acting as *amici curiae*.

While judges are thus still in the “driver’s seat”, they are increasingly able to rely on helpful support from economists sitting beside them on the front passenger seat. The ultimate decision in antitrust proceedings remains – and has to remain – with the judges, but economists increasingly contribute to an appropriate outcome to the proceedings. One can expect this development to continue, particularly due to the strengthening of private enforcement in competition law.

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